THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0280

State of New Hampshire

v.

Robert Norman

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court, Northern Division

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTIONS PRESENTED

1. Whether the court erred by denying Norman's motion to suppress.

Issue preserved by Norman's motion to suppress, A23*, the State's objection A55, the court's order, A1, Norman's motion to reconsider, A70, the State's objection, A74, and the court's order, A14.

2. Whether the evidence was sufficient to prove that the photographs constituted child sexual abuse images.

Issue preserved by Norman's arguments that the evidence was not sufficient to prove that the photographs constituted child sexual abuse images, T 16–24, the State's argument that it was, T 17–24, and the court's rulings, T 18–24.

* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"H" refers to the transcript of the motion hearing on December 21, 2016;
"T" refers to the transcript of the stipulated-facts bench trial on May 16, 2017.

STATEMENT OF THE CASE

In June 2016, the State obtained from a Hillsborough County grand jury eight indictments charging Robert Norman with possession of child sexual abuse images. A15–A22. At the conclusion of a stipulated-facts trial on May 16, 2017, the court (Brown, J.) found Norman not guilty of one indictment and guilty of the remaining seven. T 26–27; A17. On the same day, the court sentenced Norman on four of the convictions to imprisonment for four to eight years, stand committed, with the possibility of suspending one year of the minimum. A79–A86. These sentences were concurrent with each other. A79–A86. On the remaining three convictions, the court sentenced Norman to imprisonment for five to ten years, all suspended for ten years. A87–A92. These sentences were concurrent with each other but consecutive to the stand-committed sentences. A87–A92.

STATEMENT OF THE FACTS

On February 16, 2016, multiple police officers on the Hillsborough County Street Crimes Task Force were in the parking of Walmart in Amherst. T 11; A43. They noticed a pickup truck in which the driver, later identified as Robert Norman, was slumped over and appeared to be asleep. T 11; A43.

The officers walked up to Norman's pickup truck, knocked on the windows and showed their badges. T 11; A43. Norman sat up. T 11; A43. His pants were pulled down and his genitals were exposed. T 11; A43. A laptop computer, open on the passenger seat, displayed an image of a "partially nude" woman engaged in oral sex. T 11–12; A43. A vacuum hose was resting on Norman's leg. T 11; A43. Norman was later arrested for indecent exposure. T 12; A44.

The officers had Norman pull his pants up and obtained his consent to search the laptop. T 12; A43. They discovered photographs of "women in various [states] of undress in various positions." T 12; accord A43. In statements made before and after his arrest, Norman initially denied masturbating, but later admitted that that was his intent. T 12–13; A44. He said that he had about 500 pornographic images, as well as images of "younger females" wearing pantyhose or tights. T 12–13; A44.

Police also found on Norman's laptop non-pornographic images of fully-clothed girls between about six and fifteen years old. T 12; A43. The younger of these girls wore sundresses, while the teenagers wore cheerleading outfits. T 12; A43. When asked specifically about images of children, Norman said that

they sometimes appeared when he searched for images related to his fetishes: pantyhose, legs and feet. T 13; A44. Norman further elaborated on his fetishes, explaining that he likes "cheesecake pictures," images that are "not nude," but meant "to be a tease" and "suggestive." T 13; A44. Norman revoked consent to search his laptop following his arrest. A45; A56.

Based on Norman's possession of images of girls in sundresses and cheerleading outfits, John Smith, a patrolman with the Amherst Police Department and member of the Internet Crimes Against Children Task Force, prepared an application to search Norman's laptop for child sexual abuse images. A42–A54. Sergeant Tom Grella, the commander of the Task Force, reviewed Smith's application and concluded that it failed to establish probable cause. A25. However, Amherst Police Chief Mark Reams believed that the application did establish probable cause, and submitted the application to Circuit Court Justice Michael Ryan, who issued the search warrant. A25. During the search, the police located eight images of nude females that the State alleged constituted child sexual abuse images. T 14–15.

SUMMARY OF THE ARGUMENT

1. Before a magistrate may issue a search warrant, the police must demonstrate a fair probability that evidence of a crime will be found. Here, Norman's possession of images of fully-clothed girls in sundresses and cheerleading outfits did not give rise to a fair probability that he possessed child sexual abuse images. They did not establish that he was sexually attracted to children. But even if they did, evidence of motive alone is not sufficient to establish probable cause. The extensive boilerplate language in the affidavit failed to cure the defect because the generalized assertions it set forth were vague, foundationless and fallacious. Thus, the court erred by denying Norman's motion to suppress.

2. To prove that each image in this case constituted a child sexual abuse image, the State had to prove (a) that it depicts a child, (b) that it involves an exhibition of the genitals or buttocks, and (c) that that exhibition is lewd. Even if an image depicts a nude child, nudity alone is not sufficient. Here, the evidence was insufficient to prove that three of the images depict a child. Two of the images do not involve any exhibition of the genitals or buttocks. Six of the images are not lewd because they do not focus on the genitals or buttocks, do not involve a sexual setting, pose or attire, do not suggest coyness or a willingness to engage in sexual activity and were neither intended nor designed to elicit a sexual response. Thus, the evidence was insufficient to prove that any of the images constituted a child sexual abuse image.

I. THE COURT ERRED BY DENYING NORMAN'S MOTION TO SUPPRESS.

Prior to trial, Norman moved to suppress the results of the search. A23. Citing, among other provisions, Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution, Norman argued that the affidavit failed to establish probable cause. A23, A31; H 58–64, 66, 68. The State objected. A55. It acknowledged that the images of fully-clothed girls in sundresses and cheerleading outfits were not child sexual abuse images. A65; H 58, 67. It argued, however, that the affidavit nevertheless established probable cause that child sexual abuse images would be found on Norman's laptop. A62–A65; H 53–58, 66–68.

The court denied the motion to suppress. A1. It found that "the affidavit, when viewed as a whole, supports a finding of probable cause" that Norman possessed child sexual abuse images. A10.

Norman filed a motion to reconsider in which he reiterated his argument that the affidavit failed to establish probable cause, citing First Circuit precedent interpreting the Federal Constitution. A70. The State filed an objection in which it argued, for the first time, that the good faith exception to the exclusionary rule applied under the Federal Constitution. A74. The court issued an order in which it stated only, "After review, motion denied." A14; A70. By denying Norman's motion to suppress and his motion to reconsider, the court erred.

Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution require probable

cause for the issuance of a search warrant. This Court will review Norman's challenge to the warrant first under the State Constitution, relying on cases construing the Federal Constitution only for guidance. State v. Gonzalez, ___ N.H. ___ (Oct. 27, 2017); see also State v. Ball, 124 N.H. 226, 231–33 (1983).

Under both the State and Federal Constitutions, the magistrate issuing a search warrant must examine the totality of the circumstances and make a "practical, common-sense" determination of whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Letoile, 166 N.H. 269, 273 (2014); accord Illinois v. Gates, 462 U.S. 213, 238 (1983). In resolving challenges to the issuance of a search warrant, trial courts "afford much deference" to the magistrate's probable cause determination and will not read the supporting affidavit in a "hypertechnical sense." Letoile, 166 N.H. at 273. In light of the preference accorded to warrants, the question is whether the magistrate had a "substantial basis" to conclude that probable cause existed. Id.; Gates, 462 U.S. at 238–39. This standard, however, does not prevent a trial court from "conclud[ing] that a warrant was invalid because the [magistrate's] probable-cause determination reflected an improper analysis of the totality of the circumstances." State v. Ball, 164 N.H. 204, 207 (2012). This Court reviews a trial court's ruling on a motion to suppress de novo, except with respect to any controlling factual findings. Letoile, 166 N.H. at 273.

In the vast majority of search warrant applications, the police know that a particular crime has been committed; the question is whether evidence of

that crime will be found in the location to be searched. In this Court's prior cases upholding warrants to search for child pornography, for instance, the affidavits established probable cause to believe that specific, observed material constituted child pornography and was in the possession of either the defendant or a person or entity linked to the defendant. See id. at 271–72 (defendant's wife found links to child pornography on his computer); Ball, 164 N.H. at 205–06 (defendant and another man who possessed and distributed child pornography sexually assaulted a child together); State v. Ward, 163 N.H. 156, 157–58 (2012) (witness observed child pornography in the defendant's garage); State v. Dowman, 151 N.H. 162, 163–64 (2004) (defendant purchased child pornography and admitted to possessing it).

The affidavit here, however, falls within the minority of cases in which "the circumstantial evidence at hand makes it far less certain that any crime has occurred." 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.2(e), at 96 (5th ed. 2012). In these cases, most courts hold that, to establish probable cause, the affidavit must demonstrate that guilt is more probable than innocence. Id. "It is commonly said that," if the facts are "as consistent with innocent as with criminal activity," then probable cause does not exist. Id. at 96–97; see also State v. Frazier, 421 A.2d 546, 550 (R.I. 1980) ("When the arrest or search is made when the police do not know that a crime has been committed, more and better evidence is needed to prove that probable cause exists for the arrest than is the case when the police do know that a crime has been committed.").

Although the affidavit here established that Norman possessed adult pornography, that observation is irrelevant to whether Norman had an interest in child pornography. See Commonwealth v. Kaupp, 899 N.E.2d 809, 818 (Mass. 2009) (noting that search warrant affidavit "provide[d] no basis to conclude that an interest in adult pornography . . . is a basis to infer an interest in child pornography."). Instead, the application relied on two sequential, dependent inferences: (a) that Norman's possession of pictures of fully-clothed girls in sundresses and cheerleading outfits demonstrated that he was sexually attracted to children, and (b) that Norman's sexual attraction to children demonstrated that he possessed child sexual abuse images. The sufficiency of the affidavit to establish probable cause was the product of these two inferences. In sections (A) and (B) below, Norman will address whether each inference is sufficiently strong to constitute a link in the chain of probable cause. In section (C) he will address whether the product of these inferences — the chain itself — constituted probable cause that he possessed child sexual abuse images.

A. The affidavit failed to establish that it was probable that Norman was sexually attracted to children.

In the portion of the affidavit that contained information specific to this case, Smith wrote that Norman said that "he likes 'cheesecake pictures'; images that are meant to be a tease, not nude, but suggestive." A44. Smith then asserted, "This description matches that of what officers observed mixed within the adult pornography observed." A44. He then wrote, "These types of

images are referred to as child erotica, which is typically a prelude to sexually explicit images of children." A45.

The court interpreted the affidavit as asserting that Norman "admi[tted] that he has a preference for sexually suggestive photos of young girls," and that the photographs of girls in sundresses and cheerleading outfits were "sexually suggestive." A11. These findings are not supported by Smith's affidavit. Smith wrote that Norman said that "he was inclined to have images of younger females . . . wearing pantyhose or tights," A44 (emphasis added), which is consistent with a reference to young, adult women. Also, Smith never described the photographs of fully-clothed girls in sundresses and cheerleading outfits as "sexually suggestive." Rather, he wrote that Norman said that he likes non-nude pictures that are "meant to be a tease" and "suggestive," without indicating whether Norman was referring to pictures of adults or children. A44. Smith then wrote that "[t]his description matches that of what officers observed mixed within the adult pornography observed." A44. Previously in the affidavit, Smith wrote that officers had found, mixed within adult pornography, both (a) photographs of at-least partially-clothed adult women ("images of women in various stages of undress") and (b) photographs of girls in sundresses and cheerleading outfits. A43. Smith did not specify which of these photographs Norman's description "matche[d]." Smith similarly did not specify which images found on Norman's computer were the "types of images [that] are referred to as child erotica." A45. Even assuming that Smith meant to indicate that Norman's description "matche[d]" the images of girls in

sundresses and cheerleading outfits, Smith did not specify in which respects — (a) "not nude," (b) "meant to be a tease" or (c) "suggestive" — the images "matche[d]" the description.

Even interpreting Smith's affidavit as alleging that the pictures of fully-clothed girls in sundresses and cheerleading outfits were "meant to be a tease" and "suggestive," and that they constituted "child erotica," these conclusory assertions were insufficient. Smith did not provide the pictures of fully-clothed girls wearing sundresses and cheerleading outfits to the magistrate. He did not describe those pictures in any further detail, nor did he provide any basis to conclude that those images were "meant to be a tease" or "suggestive." Smith did not define the phrase "child erotica," nor did he provide any basis to conclude that the images of girls in sundresses and cheerleading outfits constituted "child erotica."

In United States v. Brunette, 256 F.3d 14 (1st Cir. 2001), a federal agent with experience investigating child pornography viewed thirty-three images that the defendant posted to the internet and, believing that they constituted child pornography, applied for a search warrant to search the defendant's home. Id. at 16. The agent, however, "did not append any of the allegedly pornographic images to the warrant application[, n]or did his affidavit contain a description of them." Id. "[I]nstead, he merely asserted that they met the statutory definition of child pornography." Id.

On appeal, the First Circuit held that the affidavit failed to establish probable cause. Id. at 19. It held that "probable cause to issue a warrant must

be assessed by a judicial officer, not an investigating agent." Id. at 18. "This judicial determination," it noted, "is particularly important in child pornography cases, where the existence of criminal conduct often depends solely on the nature of the pictures." Id. "[A]bsent an independent review of the images, or at least some assessment based on a reasonably specific description," the court held, "[i]t was error to issue the warrant." Id. at 19.

Below, the State distinguished Brunette because, here, the police did not observe anything they believed to constitute child pornography. A65, A75; H 58, 67. Thus, the State argued, the police were not required to attach the legal images of fully-clothed children to the warrant application or describe them in any detail. A65, A75; H 58, 67.

The State was correct in noting this is case is substantively different than Brunette because, here, the police did not observe anything that even arguably constituted child pornography. That difference, however, only made it more important for the police either to attach the images or to describe them in detail. When the officer in Brunette "assert[ed] that [the images he saw] met the statutory definition of child pornography," he was at least referring to an explicit, widely-agreed-upon definition. Here, in contrast, no explicit, widely-agreed-upon definition exists for the terms "teasing," "suggestive" and "child erotica."

The phrase "child erotica" is particularly ill-defined. Unlike the phrase "child pornography," "[c]hild erotica is not a legally cognizable term." United States v. Rothwell, 847 F. Supp. 2d 1048, 1053 n.10 (E.D. Tenn. 2012).

"Courts . . . have struggled to define the term 'child erotica' . . . [It] covers such a wide range of possible images that it would be hard to pinpoint just what is included." United States v. Warner, 73 M.J. 1, 5 n.1 (C.A.A.F. 2013)

While the status of a particular image as "child pornography" is an inherent property of the image, the status of an image as "child erotica" can change depending on who possesses it. "Child erotica" can, for instance, include facially innocent photographs of children that are sexually arousing only to an exceedingly small number of individuals. United States v. Gourde, 440 F.3d 1065, 1068 (9th Cir. 2006); United States v. Martin, 426 F.3d 68, 79 (2d Cir. 2005); United States v. Williams, 444 F.3d 1286, 1304 (11th Cir. 2006). Thus, "[child erotica] is a broader, more encompassing, and more subjective term than child pornography." Rothwell, 847 F. Supp. 2d at 1053 n.10. Indeed, the phrase "child erotica" is often used to describe an extremely broad range of materials. In United States v. Trejo, 471 F. App'x 442 (6th Cir. 2012), for instance, the government's expert testified that "child erotica" could include photographs of fully-clothed children that are not even "of a sexual nature." Id. at 447. [1]

Here, Smith's affidavit rested primarily on inferences drawn from Norman's possession of photographs of fully-clothed girls wearing sundresses

[1] See also United States v. Dodge, 1993 U.S. App. LEXIS 340 (6th Cir. Jan. 5, 1993) (federal agent described a children's exercise video from the Disney channel, paused when the children "opened their legs or exercised on their hands and knees," as "child erotica"); United States v. Rockot, 2007 U.S. Dist. LEXIS 62956, 2007 WL 2464477, at n.2 (W.D. Pa. Aug. 27, 2007) (U.S. government defined "child erotica" as including photographs of "minors in undergarments in department store catalogs and advertising circulars"); Leachman v. State, 2006 Tex. App. LEXIS 7345 (Tex. Ct. App. Aug. 17, 2006) (police officer testified that "child erotica" included pictures of boys with bare feet).

and cheerleading outfits. Smith failed to provide those photographs to the issuing magistrate and failed to describe them in any meaningful detail. Thus, the magistrate did not have a substantial basis to draw his own, independent inference that Norman was sexually attracted to children. Because that inference was a prerequisite to the chain of reasoning supporting the warrant, the search warrant was not supported by probable cause.

B. Even assuming that Norman was sexually attracted to children, the affidavit failed to establish that it was probable that he possessed child sexual abuse images.

Even assuming that the affidavit established that Norman was sexually attracted to children, that fact alone was not sufficient to establish probable cause that he possessed child sexual abuse images. It is virtually unheard of for magistrates to find probable cause that an individual has committed a crime on the basis of motive alone.

The police, for instance, may have overwhelming evidence that an individual is greedy — never giving to charity, always picking up pennies on the sidewalk, never offering to pay the bill at group outings — but that alone could not justify a warrant to search his home for evidence of yet-undiscovered property crimes. Similarly, the police may have overwhelming evidence that an individual is angry and hostile — glaring at strangers, insulting acquaintances, pounding his fist on tables — but that alone could not justify a warrant to search his home for evidence of yet-undiscovered assaults or murders. In short, the police may have all the evidence in the world that an individual is

"the type of person" who would commit a particular crime, but absent some evidence that he has, in fact, committed it, probable cause is lacking.

The same reasoning applies here. Even if the police had overwhelming evidence that Norman was sexually attracted to children — and thus was "the type of person" who would possess child sexual abuse images — that alone would not have justified a warrant to search his computer for evidence of that yet-undiscovered crime.

This Court's opinion in State v. Lantagne, 165 N.H. 774 (2013), illustrates this principle. In Lantagne, the defendant used his cell phone to photograph the "backsides" of girls eleven or twelve years old, most wearing bathing suits, at a waterpark. Id. at 775. When confronted by security guards, the defendant "frantically" tried to delete the photographs. Id. When questioned by the police, "the defendant admitted that he [wa]s attracted to young girls, that he ha[d] a problem, and that he need[ed] professional help." Id. at 775–76. The police arrested him for disorderly conduct, and, as a result, found child pornography in his home. Id. at 776. The defendant moved to suppress the evidence obtained following his arrest, arguing that it was not supported by probable cause that he had committed any crime. Id. The trial court denied the motion. Id.

This Court reversed. Id. at 779. It first held that "[p]hotographing properly-attired children in an open and public portion of [the water park], regardless of whether the photographs were of the children's backsides, were taken surreptitiously, or would be uploaded to a computer," did not constitute

probable cause of disorderly conduct. Id. at 778. It went on to hold, "The State articulates no other crime that a reasonable person would have believed occurred, and we are aware of none." Id. Possession of child sexual abuse images must have been among the crimes this Court considered, because it was the crime that the State ultimately charged. Id. at 775. Thus, Lantagne establishes that an individual's possession of photographs of "properly-attired children," even if the evidence clearly establishes that such possession is motivated by a sexual attraction to children, does not by itself constitute probable cause that the defendant also possesses child sexual abuse images.

Although Lantagne alone is sufficient to resolve the issue here, opinions by other courts further support Norman's position. Like Lantagne, the United States Supreme Court's opinion in Jacobson v. United States, 503 U.S. 540 (1992), establishes that one cannot infer that an individual is willing to commit the crime of possession of child pornography merely because he legally possesses images of children, even if those images clearly indicate a sexual attraction to children. In Jacobson, the defendant ordered from an adult bookstore "Bare Boys I" and "Bare Boys II," magazines containing photographs of nude preteen and teenage boys. Id. at 542–43. The photographs were legal at the time, but the law changed shortly thereafter. Id. at 543. Postal inspectors later discovered the defendant's name on the bookstore's mailing list. Id. Posing as fictitious organizations, they repeatedly solicited the defendant to order child pornography. Id. at 543–47. The defendant eventually ordered a magazine containing child pornography. Id. at 547.

The defendant claimed entrapment, and the Supreme Court held that, as a matter of law, the State failed to prove that he was predisposed to possess child pornography prior to the postal inspectors' solicitations. Id. at 550. The defendant's possession of photographs of the Bare Boys magazines boys, the Court held:

> is scant if any proof of petitioner's predisposition to commit an illegal act, the criminal character of which a defendant is presumed to know. It may indicate a predisposition to view sexually oriented photographs that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition.
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> Furthermore, petitioner was acting within the law at the time he received these magazines. . . Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence. Hence, the fact that petitioner legally ordered and received the Bare Boys magazines does little to further the Government's burden of proving that petitioner was predisposed to commit a criminal act.

Id. "[A] person's inclinations and fantasies," the Court noted, "are his own and beyond the reach of government." Id. at 551–52. "Even" if the defendant was "predispos[ed] to view photographs of preteen sex," the Court held, that would "hardly support an inference that he would commit the crime of receiving child pornography." Id. at 551; see also United States v. Hodson, 543 F.3d 286, 290 (6th Cir. 2008) (even the defendant's "continued and self-stated sexual interest

in children" did not establish probable cause that he possessed child pornography).

Lower courts have applied the Supreme Court's rationale in determining whether a search warrant establishes probable cause that an individual possesses child pornography. In United States v. Edwards, 813 F.3d 953 (10th Cir. 2015), the defendant posted to the internet over 700 photos of an approximately ten-year-old girl, "in some cases . . . only scantily clad, in various suggestive poses." Id. at 957. The photographs included pictures of the girl dressed in a leotard, a sheer ballet skirt, shiny red underwear, a dress that was open down the front, a garland strand, and thong underwear revealing her entire buttocks. Id. at 957–58. In some of the images, her legs were spread and the focus was her genitals. Id. In one, she was "sitting on the floor with her legs bent up and spread apart, showing part of her buttock and barely covering her genital area." Id. at 958. Along with the photographs, the defendant posted comments that "suggested he was . . . sexually attracted to the girl." Id. at 957.

Although the photographs were clearly sexual, they did not constitute child pornography. Id. at 958. The police nevertheless applied for a search warrant to search the defendant's home for child pornography, describing the pictures as "child erotica." Id. A magistrate granted the warrant and the police found child pornography. Id. The defendant moved to suppress the child pornography, which the trial court denied. Id.

On appeal, the Tenth Circuit held that the affidavit failed to establish probable cause that the defendant possessed child pornography. Id. at 959–69. It noted that Jacobson demonstrates "the danger of assuming that legal conduct standing alone suggests the actor is also inclined to engage in criminal conduct." Id. at 964. It also noted that several federal circuit courts hold that an individual's sexual attraction to children, standing alone, cannot support probable cause to search for child pornography. Id. at 965–69.

In addition to Edwards, several other courts have held that an individual's possession of legal photographs of children cannot, by itself, support probable cause to search for child pornography, even if the photographs depict nude children or are otherwise sexual.[2] Many courts hold that, even if an affidavit establishes probable cause that an individual has sexually assaulted a child — perhaps the strongest possible evidence of sexual attraction to children and a willingness to violate the law — that fact alone is insufficient to search for child pornography.[3] In order for evidence of child

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[2] United States v. Perkins, 850 F.3d 1109, 1121–23 (9th Cir. 2017) (probable cause lacking even though the affidavit established that the defendant possessed images of nude children); United States v. Doyle, 650 F.3d 460, 470–76 (4th Cir. 2011) (probable cause lacking even though the affidavit alleged that the defendant possessed images of nude children); United States v. Weber, 923 F.2d 1338, 1343–46 (9th Cir. 1990) (affidavit that established that the defendant ordered child pornography established only probable cause for the specific child pornography the defendant ordered, not additional child pornography); United States v. Hicks, 2012 U.S. Dist. LEXIS 137189, 2012 WL 4460653 (W.D. Ky. Sep. 24, 2012) (probable cause lacking even though the affidavit alleged that the defendant possessed photographs depicting "the clothed buttocks, breasts and cleavage of young teenage girls at a birthday party . . . and some surreptitiously taken photographs of a teenage girl walking to and standing at a bus stop"); DePugh v. Penning, 888 F. Supp. 959, 987 (N.D. Iowa 1995) (probable cause lacking even though the affidavit alleged that the defendant possessed "a photo of a young female in a bathing suit" because "[i]t would take a tremendous leap of faith to turn a photograph of a young female in a bathing suit into evidence of child pornography").

[3] Perkins, 850 F.3d at 1120 (affidavit failed to establish probable cause to search for child pornography, even though it alleged that the defendant had prior convictions for incest and child molestation); United States v. Needham, 718 F.3d 1190, 1195 (9th Cir. 2013) (affidavit

sexual assault or attempted child sexual assault to constitute probable cause of child pornography, the affidavit must establish a close connection between photographs and videos and the actual or attempted assaults.[4]

The generic, boilerplate language constituting the majority of the affidavit here, A45–52, did not cure the defect, because probable cause must be "particularized." Ybarra v. Illinois, 444 U.S. 85, 91 (1979). In one section, Smith wrote about "certain characteristics common to individuals who utilize the internet to access with intent to view and/or possess, receive, or distribute images of child pornography." A45–A7. He then wrote, "Based on the following, I believe that the target of this investigation likely displays characteristics

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failed to establish probable cause to search for child pornography, even though it alleged that the defendant sexually assaulted a five-year-old); United States v. Pavulak, 700 F.3d 651, 656–63 (3d Cir. 2012) (affidavit failed to establish probable cause to search for child pornography, even though it alleged that the defendant pleaded guilty to sexually assaulting children); Dougherty v. City of Covina, 654 F.3d 892, 897–99 (9th Cir. 2011) (affidavit failed to establish probable cause to search for child pornography even though it alleged that the defendant, a teacher, touched his student's breasts); Virgin Islands v. John, 654 F.3d 412, 418–22 (3d Cir. 2011) (affidavit failed to establish probable cause to search for child pornography even though it alleged that the defendant, a teacher, sexually assaulted several of his students); Doyle, 650 F.3d at 464–75 (4th Cir. 2011) (affidavit failed to establish probable cause to search for child pornography, even though it alleged that the defendant sexually assaulted three children); United States v. Falso, 544 F.3d 110, 114–23 (2d Cir. 2008) (affidavit failed to establish probable cause to search for child pornography even though it alleged that the defendant pleaded guilty to sexually assaulting a seven-year-old); Hodson, 543 F.3d at 287–89 (6th Cir. 2008) (affidavit failed to establish probable cause to search for child pornography, even though it alleged that the defendant admitted that he "favored young boys, liked looking at his nine- and eleven-year-old sons naked, and had even had sex with his seven-year-old nephew"); United States v. Zimmerman, 277 F.3d 426, 430–32 (3d Cir. 2002), (affidavit failed to establish probable cause to search for child pornography, even though it alleged that the defendant, a teacher, sexually assaulted his students).

[4] See, e.g., State v. Kirsch, 139 N.H. 647, 656 (1995) (affidavit established probable cause to search defendant's home for child pornography because it alleged that the defendant showed children pornographic movies, photographed them in the nude and sexually assaulted them); United States v. Colbert, 605 F.3d 573, 575–79 (8th Cir. 2010) (affidavit established probable cause to search defendant's apartment for child pornography because it alleged that he attempted to lure a five-year-old to his apartment by telling her that he "had movies and videos she would like to watch"); United States v. Hansel, 524 F.3d 841, 843–46 (8th Cir. 2008) (affidavit established probable cause to search the defendant's residence for child pornography because it alleged that the defendant observed two children in the nude, took pictures of them in swimsuits and sexually assaulted them).

common to individuals who access with intent to view and/or possess, receive or distribute child pornography." A47. The promised grounds for this conclusion, however, never appear. Instead, Smith proceeded to set forth another generic section giving a "background on computers and child pornography." A47–48.

Smith wrote that his knowledge about child pornography collectors was "[b]ased on [his] previous investigative experience related to child pornography investigations, [his] training, and the experience of other law enforcement officer with whom [he had] had discussions." A45. Although Smith was assigned to the Internet Crimes Against Children Task Force, A43, he did not indicate how long he had been a member. He did not specify what, if any, experience he had related to child pornography investigations. Aside from being trained in the use of forensic software, A43, he did not indicate that he had received any training specific to child pornography or the characteristics of those who collect it. He did not identify which officers he had had discussions with, nor did he specify what training and experience, if any, those officers had.

The Ninth Circuit addressed similar boilerplate language in United States v. Weber, 923 F.2d 1338 (9th Cir. 1990). There, "several pages of the affidavit" set forth "a general description of the proclivities of pedophiles . . . based on [the affiant's] experience and training in child pornography investigations and his discussions with other law enforcement agents." Id. at 1341. The affiant referred to "child molesters," "pedophiles" and "child pornography collectors," but failed to define any of those terms. Id. He also failed to allege that the

defendant belonged to any of those groups. Id. The court noted that these "rambling boilerplate recitations [were] designed to meet all law enforcement needs" and were "not drafted with the facts of this case or this particular defendant in mind." Id. at 1345.

The court held that these boilerplate assertions failed to supply probable cause. Id. at 1345–46. "[I]f the government presents expert opinion about the behavior of a particular class of persons," it held, "for the opinion to have any relevance, the affidavit must lay a foundation which shows that the person subject to the search is a member of the class." Id. at 1345. "Had [the affiant] taken the time and conscientiously drafted an affidavit tailored to what he knew about [the defendant] rather than submitting an affidavit describing generally information about different types of perverts who commit sex crimes against children," it noted, "he might have realized that he did not know enough about [the defendant] to state that there was reason to believe that [the defendant] was one of the 'types' described or possessed any of the habits ascribed to such types." Id. Because boilerplate language was "foundationless," the court held, it "may have added fat to the affidavit, but certainly no muscle." Id. at 1346; see also United States v. Perkins, 850 F.3d 1109 (9th Cir. 2017) (finding similar boilerplate language insufficient).[5]

[5] This is not to say that police expertise can never contribute to a finding of probable cause. In United States v. Adkins, 169 F. App'x 961 (6th Cir. 2006), the affiant consulted with an expert on crimes against children, who considered a wealth of information specific to the defendant, including that he recently molested young children, that he kept stuffed animals and other toys in his car even though he had no children, that he spent an inordinate amount of time on the internet in 2003 and visited a website for persons with a sexual interest in wearing diapers, that he planned to kidnap a child for sexual purposes, that he was a victim of sexual abuse and that he was sexually aggressive as a child. Id. at 963–64. Based on these facts, the expert

Smith's assertion that "[t]hese types of images are referred to as child erotica, which is typically a prelude to sexually explicit images of children," A45, is similarly insufficient to contribute to probable cause. The statement is ambiguous. It might mean either (a) that those who possess sexually explicit images of children "typically" possess child erotica as well, or (b) that those who possess child erotica "typically" possess sexually explicit images of children as well. Smith did not specify.

It is likely that Smith meant that those who possess sexually explicit images of children typically possess child erotica as well. To determine the probability that someone possesses child erotica, given that they possess sexually explicit images of children, the police would only need to identify a representative sample of individuals found to possess child pornography and determine what percentage of those individuals also possessed child erotica, a relatively straightforward task. Determining the probability that someone possesses sexually explicit images of children, given that they possess child erotica, would be much more difficult. To do so, one would need to obtain a representative sample of individuals who possess child erotica and determine what percentage of those individuals also possess child pornography. Because child erotica is legal, however, the police lack access to any representative sample of those who possess it. Because of the stigma associated with

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concluded that the defendant was a "preferential offender" and thus, "probably had a collection of child pornography." Id. at 964. In light of the detailed information set forth in the affidavit, the Sixth Circuit held that it established probable cause. Id. at 967. Here, the fact that Norman possessed photographs of fully-clothed girls in sundresses and sundresses does not begin to approach the level of relevant, particularized detail that formed the foundation of the expert's opinion in Adkins.

possession of child erotica, and the illegality of possessing child pornography, even the most determined social scientist would have a difficult time obtaining such a sample. Thus, this Court should interpret the affidavit as asserting only that those who possess child pornography typically possess child erotica as well.

There may very well be a high probability, if an individual possesses illegal child pornography, that he also possesses legal child erotica. But that fact implies nothing about the probability, if an individual possesses legal child erotica, that he also possesses illegal child pornography. Equating conditional probabilities in this manner is called the "transposition fallacy" or "prosecutor's fallacy." Federal Judicial Center, Reference Manual on Scientific Evidence 209 (3d ed. 2011) (the "fallacy confuses the conditional probability of A given B . . . with that of B given A"); see also McDaniel v. Brown, 558 U.S. 120, 137 (2010) (explaining the fallacy in the context of DNA evidence).

Courts have recognized and rejected this type of fallacious reasoning in evaluating probable cause to search for child pornography. In United States v. Falso, 544 F.3d 110 (2d Cir. 2008), for instance, the Second Circuit held that the affidavit failed to establish probable cause to search for child pornography, even though it established that the defendant was sexually attracted to children and the affiant asserted that "the majority of individuals who collect child pornography are persons who have a sexual attraction to [children]." Id. at 122. The court observed, "It is an inferential fallacy of ancient standing to conclude that, because members of group A (those who collect child

pornography) are likely to be members of group B (those attracted to children), then group B is entirely, or even largely composed of, members of group A." Id. (quotation omitted); see also State v. Poling, 531 S.E.2d 678, 688 n.3 (W. Va. 2000) (Starcher, J., dissenting) ("Most heroin users once drank alcohol, but no one charges alcohol with being gateway to heroin."); Federal Judicial Center, supra, at 258 n.119 ("there is a high probability that an individual who is a [U.S.] senator is a man, but the probability that an individual who is a man is a senator is practically zero.").

In Edwards, which is particularly analogous to the facts here, the Tenth Circuit held that the affidavit failed to establish probable cause to search for child pornography, even though it established that the defendant possessed "hundreds of images of child erotica" and the affiant asserted that "that those who possess child pornography are highly likely also to possess child erotica." Edwards, 813 F.3d at 964–65. The court observed that it was error for the trial court to "invert[] the statement in the affidavit, reading it instead as an assertion that those who possess child erotica are highly likely to possess child pornography." Id. at 965.

Even if this Court interprets Smith's affidavit to assert that those who possess child erotica typically possess child pornography as well, that assertion still fails to establish probable cause to search for child pornography. Smith provided no basis for such an assertion. And as noted above, it would be extremely difficult for law enforcement officers or social scientists to obtain the

type of representative sample that would be required to establish such a proposition.

Courts have refused to credit such unsupported assertions in similar cases, even when they are made by experienced police officers. In Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. 2011), for instance, the affidavit established that the defendant, a teacher, sexually assaulted his students. Id. at 896. The affiant "had fourteen years of experience on the police force, had worked as a School Resource Officer[,] had over 100 hours of training involving juvenile and sex crimes, had conducted hundreds of investigations related to sexual assaults and juveniles, and was the designated 'Sex Crimes/Juvenile Detective' for the police department." Id. He asserted, "based upon [his] training and experience . . . [he] kn[e]w [that] subjects involved in this type of criminal behavior have in their possession child pornography." Id. The Ninth Circuit, however, concluded that the affiant's "conclusory statement . . . [wa]s insufficient to create probable cause." Id. at 899.

In United States v. Needham, 718 F.3d 1190 (9th Cir. 2013), the affidavit established that the defendant sexually assaulted children, leading the affiant to conclude that he had "an unnatural sexual interest in children." Id. at 1191–92. The affiant was assigned to the police department's "Youth Services Bureau" and "specialized in the investigation of crimes against children." Id. at 1192–93. "Based upon [her] training and experience," she asserted that people with "an unnatural sexual interest in children . . . collect sexually explicit material of children." Id. at 1192. The Ninth Circuit did not question the

conclusion that the defendant was sexually attracted to children. But because the affiant failed to provide any basis for the "bare inference" that such individuals collect child pornography, it found that the affidavit failed to establish probable cause. Id. at 1195.

C. Even if each inference was probable, the affidavit failed to establish that the product of those inferences constituted probable cause that Norman possessed child sexual abuse images.

The probability that two propositions are both true is less than their individual probabilities. If a person flips a coin twice, for instance, the probability that the coin will land on heads on the first toss is 50%. If it lands on heads on the first toss, the probability that it will land on heads on the second toss is 50%. The probability that it will land on heads on both tosses, however, is only 25%.

Courts have recognized this principle in evaluating probable cause to search for child pornography. In Weber, the Ninth Circuit observed that, "with each succeeding inference, the last reached is less and less likely to be true." Weber, 923 F.2d at 1345. "Virtual certainty becomes probability, which merges into possibility, which fades into chance." Id.; see also Falso, 544 F.3d at 124 (noting "the dangers of coupling" inferences).

Here, even if the affidavit established (a) that Norman was probably sexually attracted to children and (b) that, if an individual is sexually attracted to children, he probably possesses child pornography, it failed to establish probable cause for the product of these two inferences — that Norman possessed child pornography.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE PHOTOGRAPHS AT ISSUE CONSTITUTED CHILD SEXUAL ABUSE IMAGES.

At the stipulated-facts trial, the State introduced the images that it alleged constituted child sexual abuse images. T 15. Norman argued that none of the images qualified as child sexual abuse images. T 16, 19. He noted that, for each image to constitute "sufficient evidence" that it was child sexual abuse image, the State had to prove three elements: "1) the age of the individual; 2) that the genitals . . . or buttocks [are] exposed . . . and 3) that they are lewd exhibitions." T 16. Norman challenged the sufficiency of each image under each of those three elements. T 17, 19–24.

The court concluded that, for one of the images, file name "thCAP99NQL", the evidence was insufficient. T 20. For the remaining seven images, the court concluded that the evidence was sufficient. T 18–24. By finding the evidence sufficient with respect to those seven images, the court erred.

Evidence is legally insufficient to establish an element of the offense if "no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Fiske, ___ N.H. ___ (Sep. 21, 2017). The conviction of a defendant on the basis of legally insufficient evidence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson v. Virginia, 443 U.S. 307, 317–318 (1979).

Sufficiency of the evidence is reviewed de novo. State v. Candello, ___ N.H. ___ (July 7, 2017).

RSA 649-A:3 prohibits the possession of "any visual representation of a child engaging in sexually explicit conduct." "'Child' means any person under the age of 18 years." RSA 649-A:2, I. Thus, the first element the State had to prove was that the image portrayed an individual under less than 18 years old.

"Sexually explicit conduct" is defined as:

> human masturbation, the touching of the actor's or other person's sexual organs in the context of a sexual relationship, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the same or opposite sex or between humans and animals, or any lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture. Sexual intercourse is simulated when it depicts explicit sexual intercourse that gives the appearance of the consummation of sexual intercourse, normal or perverted.

RSA 649-A:2, III. None of the images at issue here involve masturbation, the touching of sexual organs, actual or simulated sexual intercourse, flagellation, bondage or torture. Rather, the State argued that each constitutes a "lewd exhibition[] of the buttocks [or] genitals." Thus, the second element the State had to prove was that the image constituted an "exhibition[] of the buttocks [or] genitals." The third element the State had to prove was that the exhibition was "lewd." Norman will address each of these three elements in turn.

A. The evidence was insufficient to prove that three of the images depicted children.

"Direct evidence is evidence which, if accepted as true, directly proves the fact for which it is offered, without the need for the factfinder to draw any

inferences." State v. Germain, 165 N.H. 350, 359 (2013). Evidence that, if accepted as true, still requires the factfinder to draw an inference is circumstantial. Id. Here, the State relied entirely on the appearance of the depicted individuals to prove their ages. The State did not introduce birth certificates or other records establishing the birthdates of the individuals in question, nor did the State introduce any evidence that any of the individuals ever indicated how old she was when the image was created.[6] Because the evidence required the court to draw an inference about the individuals' ages based on their appearance, it constituted circumstantial evidence.

"When the evidence is solely circumstantial, it must exclude all reasonable conclusions except guilt." State v. Morrill, 169 N.H. 709, 718 (2017). "The reviewing court evaluates the evidence in the light most favorable to the State and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt." State v. Zubhuza, 166 N.H. 125, 130 (2014) (brackets omitted).

[6] Identifying the individuals in pornographic images is not infeasible. The National Center for Missing and Exploited Children operates the Child Victim Identification Program ("CVIP"), which "serves as the central repository in the U.S. for information relating to child victims depicted in sexually exploitive images and videos." http://www.missingkids.com/CVIP (last accessed on December 8, 2017). If law enforcement agents believe that an individual depicted in a pornographic image may have been less than eighteen years of age at the time the image was made, they may submit the image to the CVIP, which will determine whether the image depicts a previously identified individual. Id.; see also United States v. Rodriguez-Pacheco, 475 F.3d 434, 443 (1st Cir. 2007) (noting that "multiple images taken from defendant's computer were identified as depicting real children" through the CVIP). Here, however, there is no evidence that the State submitted any of the images in question to the CVIP.

With respect to three of the images, file names "ca19379", "lsm-05-01-048" and "thCAE6C16J", the evidence was insufficient to prove that the image portrayed an individual less than 18 years old.

The image with file name "ca19379" portrays a female sitting, with her knees raised. She is looking down and to her left. Her lower legs obscure the rest of her body. The image with file name "thCAE6C16J" portrays a female lying, face down, in the woods. Only the back of her body is visible and her face is difficult to see. Cf. State v. Houghton, 168 N.H. 269, 272 (2015) (evidence insufficient to prove age where, among other things, "the face of the individual . . . is almost completely obscured").

The image with file name "lsm-05-01-048" portrays one female lying, face down, with her feet towards the camera, and a second female lying, face up, with her head towards the camera. Most of first female's body is blocked by the second female. Her face is visible, however, and is consistent with that of an adult woman. The face and breasts of the second female are visible. Her breasts are developed and her face is consistent with that of an adult woman. Cf. id. (evidence insufficient to prove age where, among other things, "the individual . . . appears to have undergone puberty.").

Additionally, all of the images are pixelated. Cf. id. (noting that pixilation makes it difficult to determine subject's age). For these reasons, no reasonable factfinder could conclude, beyond a reasonable doubt, that the evidence proves that the females portrayed in these images were less than eighteen years old.

B. Two of the images do not involve any exhibition of the genitals or buttocks.

In the image with filename "lsm-05-01-048", neither the genitals nor the buttocks of either female are visible. The image with filename "thCA517BF0" depicts a nude lying girl on her back with her legs raised. Neither her genitals nor her buttocks are visible. These images do exhibit their subject's genitals or buttocks and thus, as matter of law, cannot constitute child sexual abuse images.

C. Six of the images do not involve a "lewd" exhibition of the genitals or buttocks.

Even if an image depicts a nude child, "a visual depiction of mere nudity of a child, without more, is not a lewd exhibition of the genitals." State v. Lopez, 162 N.H. 153, 156 (2011). Rather, this Court has adopted a six-factor analysis to employ in determining whether an image depicts "a lewd exhibition of the genitals." Id. (adopting six factors articulated in United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986) (the "Dost factors")). Those factors are:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. Under these factors, the images with file names "ca19379", "CA7DDVC2", "thCA9TPYU5", "thCA517BF0", "thCAE6C16J" and "thCAQJFBIZ" do not involve a lewd exhibition of the genitals or buttocks.

In none of those images is the focal point the female's genitalia, pubic area or buttocks. All of the photographs portray the female's full body; they are not focused on any particular body part. Cf. id. at 157 (reasonable jury could conclude that Dost factors were satisfied where some photographs "cropped out [the subject's] head" and others "focused on her breasts or buttocks"). Furthermore, all of the photographs are pixilated; they quickly become "blocky" if the viewer attempts to "zoom in" to any particular area. In all of the photographs, the female's genitals are either partially or fully blocked from view due to the female's position and the location of camera. Cf. State v. Bergeron, No. 2016-0088, at *5 (N.H. June 30, 2017) (non-precedential order) (image of nude children not "lewd" because genitals were at least partially blocked from view). Even in those photographs where the subject's vulvar cleft is at least partially visible, other genital structures, such as the clitoris, labia minora and vaginal opening, are not visible at all. In "thCAE6C16J", the female's genitals are not visible at all and her buttocks are partially blocked by her leg or foot. Her anus is not visible at all.

None of the photographs involve a sexually suggestive setting. "CA7DDVC2", "thCAE6C16J" and "thCAQJFBIZ" were taken outdoors, while "ca19379", "thCA9TPYU5" and "thCA517BF0" were taken in a photography

studio. Cf. id. at *6 ("a photography studio . . . is not a place that is generally associated with sexual activity").

None of these photographs involve an unnatural pose or inappropriate attire. Although the females are nude, none of the images suggest sexual coyness or a willingness to engage in sexual activity. There is no evidence that any of these photographs were intended or designed to elicit a sexual response in the viewer.

For these reasons, no reasonable factfinder could conclude that these images involve a lewd exhibition of the genitals or buttocks.

CONCLUSION

WHEREFORE, Robert Norman respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decisions on the first issue are in writing and are appended to the brief. The appealed decisions on the second issue were not in writing and therefore are not appended to the brief.

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

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New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301

_____
Thomas Barnard

DATED: December 14, 2017

A P P E N D I X

APPENDIX – TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Robert Norman

Docket No. 216-2016-CR-00787

ORDER

Defendant, Robert Norman, is charged with eight counts of possession of child sexual abuse images and one count of indecent exposure and lewdness. Defendant now moves to suppress statements that he made during police questioning and evidence obtained during a subsequent search of his electronics. The State objects. The Court held a hearing on December 21, 2016, at which it heard the testimony of Detective Nicholas Skiba of the Amherst Police Department and Lieutenant Brian Newcomb of the Hillsborough County Sheriff's Office. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Factual Background

I. The Arrest

On the evening of February 16, 2016, members of the Hillsborough County Sheriff's Street Crimes Task Force (the "task force")[1] were conducting surveillance for

[1] The task force was composed of Detectives Johnson and Skiba, Officers Palmer and Macalino, Lieutenant Newcomb, and Sergeant O'Donnell. During the following encounter with defendant, each officer was dressed in plain clothes and wore their badges around their necks.

an unrelated matter in the Wal-Mart parking lot in Amherst, New Hampshire. As they prepared to leave the parking lot, the officers noticed a blue pickup truck with its hood "popped" and wires running from the front of the hood into the passenger side window. The officers also observed a male subject slumped over in the driver's seat who appeared to be unconscious. Believing the driver may have overdosed on drugs, the officers approached the truck to check on him.

Upon reaching the vehicle, Lieutenant Newcomb introduced himself to the driver, later identified as defendant. As the two spoke, Lieutenant Newcomb observed that defendant's pants were pulled down to his ankles and his genitals were exposed. He further observed a cellphone, an external hard drive, and a laptop computer displaying adult female pornography all on the front passenger seat, and a "shop-vac" vacuum in the backseat. When asked by Lieutenant Newcomb why he did not have any pants on, defendant was unable to provide a satisfactory answer. Lieutenant Newcomb contacted Detective Skiba at that time and requested he respond to the scene.

After arriving and speaking briefly with Lieutenant Newcomb, Detective Skiba approached the truck and engaged defendant in conversation regarding the condition officers had found him in.[2] After some back and forth, Detective Skiba opened the driver's side door and asked defendant to exit and pull up his pants. Once the door was opened, Detective Skiba observed a tube of lotion in the door compartment and some used tissues on the truck's floor. This prompted Detective Skiba to ask defendant if he had used the shop-vac to masturbate, to which defendant replied he had not.

[2] At the hearing, Detective Skiba explained the officers' positioning during his conversation with defendant: Officer Audette, a uniformed patrol officer, was positioned in-front of defendant's vehicle, a few car spaces away; Detective Johnson was near the front passenger door; Officers Palmer and Marcalino were near the back passenger door; Sergeant O'Donnell was on the driver's side of the vehicle; and Detective Skiba and Lieutenant Newcomb were speaking with defendant.

Defendant further responded that he was in fact changing his pants and vacuuming his lap off when the officers initially approached him.

At some point during this conversation between Detective Skiba and defendant, Lieutenant Newcomb asked defendant for consent to search his computer. After defendant consented, Detective Johnson opened the front passenger door and began looking through the computer's contents. During this search, Detective Johnson located hundreds of photos of adult pornography, with photographs of young girls in sundresses and cheerleader outfits interspersed throughout. He informed Sergeant O'Donnell of the photographs, and Sergeant O'Donnell asked defendant if any of the young girls on his computer were his family members. Defendant replied that they were not. Detective Skiba then asked defendant if he looked at the photographs of young girls for any kind of sexual gratification. Defendant responded that he had a fetish for photographs of young girls in such things as pantyhose and stockings. After defendant continued thereafter to provide unsatisfactory answers regarding the reason he had been half-naked in a public parking lot, Detective Skiba placed him under arrest for indecent exposure and lewdness. Lieutenant Newcomb then instructed Detective Johnson to stop searching defendant's computer.

II. The Search Warrant

On February 19, 2016, Officer John Smith of the Amherst Police Department submitted a warrant application to the Milford District Court. The application sought the authority to search defendant's computer, cellphone, and external hard drive for evidence of the crime of possession of child sexual abuse images. An accompanying

affidavit detailed the interaction with defendant leading to his arrest as well as the following additional information.

During the officers' search of defendant's laptop in the Wal-Mart parking lot, they observed numerous folders containing images of women in various positions and stages of undress. Mixed amongst these photos were photographs of children, estimated to be between the ages of six and fifteen. The younger girls were wearing sundresses and the teenage girls were wearing cheerleader outfits. The affidavit described these photographs as "child erotica." (Ex. A, ¶ 36.)

Defendant stated that none of the young girls in the photographs were related to him. Defendant further stated that he was inclined to have images of young females on his computer if they were wearing pantyhose or tights. After being placed under arrest for indecent exposure and lewdness, defendant was interviewed by Detective Matthew Flemming of the Bedford Police Department and Officer Jason Palmer of the Milford Police Department. During this interview, defendant admitted that his laptop was open displaying pornographic images for the purpose of stimulating himself. Defendant was asked if he was masturbating, to which he responded "not yet," but "it would have been nice" if he had plans to do so. Defendant stated there were approximately 500 images of adult pornography on his computer. Defendant further stated the cellphone in the truck was his, but asserted it did not contain any pornography. Defendant also informed the officers that he uses the external hard drive to back-up his computer.

In addition, defendant further revealed that he uses the Nashua Library public WiFi service for accessing the website "Torrent" to download movies and television shows so that the same would not be traced back to him. When asked about the

images of young girls in his possession, defendant stated the images sometimes appear when he searches for his fetishes: pantyhose, legs, and feet. Defendant described the images as "cheesecake pictures," explaining they are meant to be a tease—not nude—but suggestive. He further clarified, stating, "That is what I like." (Id. ¶ 34.)

In addition to the foregoing information, Officer Smith's affidavit contained numerous averments outlining his own experience in investigating crimes related to the sexual exploitation of children and child pornography. Among other things, Officer Smith discussed some of the traits and/or habits known to be commonly exhibited by individuals who possess or distribute child pornography. In pertinent part, he averred that individuals who possess child pornography "may receive sexual gratification, stimulation, and satisfaction from . . . fantasies they may have viewing children engaged in sexual activity or in sexually suggestive poses." (Id. ¶ A.) He also discussed in detail how "[i]ndividuals who have a sexual interest in children or images of children often use these materials for their own sexual arousal and gratification . . . ." (Id.) Later in the affidavit, Officer Smith also explained that these types of images are referred to as "child erotica, which [are] typically a prelude to sexually explicit images of children." (Id. ¶ 36.) Finally, the affidavit conveys how individuals with a sexual interest in children typically retain such images for many years, often on their "computer and the area immediately surrounding [their] computer." (Id. ¶ A.)

The warrant application was subsequently granted and, on February 26, 2016, Officer Smith searched defendant's computer, cellphone, and external hard drive, finding child sexual abuse images on the computer and hard drive.

Legal Analysis

As stated above, defendant now seeks to suppress the statements he made to police in the Wal-Mart parking lot, and all of the evidence obtained during the search of his computer, arguing: (1) his statements were made during a custodial interrogation and he was not read his Miranda rights; (2) his statements must be excised from the warrant application; and (3) the warrant affidavit did not establish probable cause to believe that evidence of the crime of possession of child pornography would be found on his electronic devices. The Court will address each of the defendant's arguments in turn. As the New Hampshire Constitution provides at least as much protection in these areas as the United States Constitution, the Court addresses the defendant's claims under the State Constitution, citing to federal authority for guidance only. See State v. Bell, 164 N.H. 452, 455 (2012); State v. Ball, 124 N.H. 226, 231–33 (1983).

I. Defendant's Statements

Defendant first argues the statements he made to police in the Wal-Mart parking lot prior to being read his Miranda rights should be suppressed because he was in custody.

"Custody entitling a defendant to Miranda protections requires formal arrest or restraint on freedom of movement of the degree associated with formal arrest." State v. McKenna, 166 N.H. 671, 676 (2014). "In the absence of formal arrest, [the Court] must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation." Id. at 676–77. In determining whether a "reasonable person in the defendant's position would believe himself in custody, [the Court considers] the totality

of the circumstances of the encounter," including, but not limited to, "factors such as the number of officers present, the degree to which the suspect was physically restrained, the interview's duration and character, and the suspect's familiarity with his surroundings." Id. at 677 (internal quotations omitted).

"A defendant is not in custody for Miranda purposes, however, merely because his freedom of movement has been curtailed so that he has been 'seized' in a Fourth Amendment sense." State v. Turmel, 150 N.H. 377, 383 (2003). "A person is considered 'seized' if, in view of all the circumstances surrounding an investigatory stop, a reasonable person would have believed that he was not free to leave." Id. "During an investigatory stop, a reasonable person may not feel free to leave, because, in fact, he is not free to leave." Id. "The police may temporarily detain a suspect for investigatory purposes." Id. "Such temporary custody does not, however, constitute custody for Miranda purposes and, therefore, Miranda warnings are not triggered." Id.

In the instant matter, the Court finds that, at the time defendant made the challenged statements, he was being held within the confines of a valid investigatory stop and thus not entitled to Miranda protections. After approaching defendant's vehicle in fear that he had overdosed, the police observed that his pants were down and his genitals exposed. At that time, in light of the public nature of the parking lot, the police had reasonable suspicion to detain defendant for purposes of determining whether he had committed the crime of indecent exposure.

Upon arrival, Detective Skiba requested defendant step out of the vehicle, a permissible request during an investigatory stop. See id.; State v. Hamel, 123 N.H. 670, 676 (1983). In an effort thereafter to confirm or dispel the suspicion that defendant

indecently exposed himself, Detective Skiba asked defendant if he had used the shop-vac vacuum to masturbate and for an explanation as to why he was not wearing any pants. At no point during the foregoing interaction did any officer physically restrain defendant or curtail his freedom of movement. Moreover, the detention's duration and tone were not suggestive of a custodial interrogation. Detective Skiba's questioning was short, lasting only five to ten minutes, was focused upon defendant's reason for having his genitals exposed, and, as testified to by Lieutenant Newcomb, each officer used a casual tone and exhibited a "laid back" demeanor towards defendant throughout the detention.

Defendant argues the presence of seven officers converted the questioning into a custodial interrogation. The Court disagrees. The number of officers present, does not in and of itself, establish custody. See Lee, 317 F.3d at 31 (stating that the presence of five officers does not, without more facts, "lead inexorably to a conclusion that" the stop went beyond the scope of a Terry stop); United States v. Quinn, 815 F.2d 153, 156–57 (1st Cir. 1987) (holding that the presence of several police officers and the blocking of defendant's car did not convert an investigative stop into an arrest). Although seven officers were present at the scene, only two officers spoke with defendant and were in his immediate vicinity for the majority of the detention. Moreover, six of the seven officers, including both officers who actually spoke with defendant, were dressed in plain clothes and did not have their weapons displayed. Finally, defendant was not unfamiliar with his surroundings, as he voluntarily chose to park his vehicle in the Wal-Mart parking lot where the questioning occurred.

Therefore, while it is true defendant was not free to leave because he was seized pursuant to a lawful investigatory stop; based upon the totality of the surrounding circumstances, the Court finds he could not reasonably conclude that he was under arrest or its functional equivalent. Accordingly, to the extent defendant seeks to suppress the statements defendant he made to police in the Wal-Mart parking lot, his motion is DENIED.

II. Search Warrant Affidavit

As a preliminary matter, because defendant's statements were lawfully obtained, they need not be excised when considering the sufficiency of the search warrant affidavit. Nevertheless, even with these statements, defendant argues the affidavit lacks sufficient probable cause. Relying on State v. Dowman, 151 N.H. 162 (2004), defendant contends that in child pornography cases, probable cause can only be established in three ways: (1) an admission by the suspect that his devices contain child pornography; (2) police observation of child pornography on a suspect's device, and a subsequent description sufficiently describing the images as child pornography; or (3) police observation of child pornography on a suspect's device, and subsequent attachment of the photos to the search warrant, so the magistrate can make an independent determination of the images in question.

However, in Dowman, the New Hampshire Supreme recognized that "application[s] for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the **same standard** of probable cause used to review warrant applications generally." 151 N.H. at 164 (emphasis added) (quoting New York v. P.J. Video, Inc., 475 U.S. 868, 875 (1986)); see also;

United States v. Gourde, 440 F.3d 1065, 1074 (9th Cir. 2006) (rejecting the notion "that a search warrant for child pornography may issue only if the government provides concrete evidence, without relying on any inferences, that a suspect *actually* receives or possesses images of child pornography"); United States v. Brunette, 256 F.3d 14, 16 (1st Cir. 2001) (holding the probable cause "assessment is no different where First Amendment concerns may be at issue"). As such, the Court sees no reason to apply a different standard in the instant matter. The test for probable cause under the State Constitution is well settled:

> Part I, Article 19 requires that search warrants be issued only upon a finding of probable cause. Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction. To establish probable cause, the affiant need only present the magistrate with sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence or contraband sought will be found in the place to be searched.

State v. Ward, 163 N.H. 156, 159 (2012).

The Court "utilize[s] a totality-of-the-circumstances test to review the sufficiency of an affidavit submitted in an application for a search warrant." State v. Letoile, 166 N.H. 269, 273 (2014). "[The Court] review[s] the affidavit in a common-sense manner[,]" and "will not invalidate warrants by reading the evidence in a hypertechnical sense." State v. Dalling, 159 N.H. 183, 185 (2009).

Applying the foregoing principles, the Court finds the affidavit, when viewed as a whole, supports a finding of probable cause. The affidavit sets forth that defendant was found in a parked truck in a public area with his pants down and genitals exposed. Inside his truck was a laptop computer displaying adult pornographic images, a tube of lotion, and used tissues on the floor. The affidavit further sets forth that, upon receiving

consent to search defendant's computer, Detective Johnson found hundreds of pornographic images, with photographs of young girls between the ages of six and fifteen wearing sundresses and cheerleader outfits interspersed throughout. When probed about the latter images—described in the affidavit as child erotica—defendant stated that none of the young girls were related to him and that he had a preference for such girls wearing garments such as pantyhose and tights. Defendant also later stated later that he uses public internet service in order to download items without them being traceable back to him and revealed his proclivity towards viewing sexually suggestive images of young girls—or, "cheesecake pictures" as he described them.

Finally, the affidavit contained pertinent background information from Officer Smith based upon his training and experience regarding those characteristics commonly associated with individuals who possess child pornography, including: (1) they may receive sexual gratification from viewing children in sexually suggestive poses; and (2) those who have an interest in children often use these materials for their own sexual arousal and gratification. Based on defendant's own admission that he has a preference for sexually suggestive photos of young girls, the fact that such images were observed on his computer during the consented to search, and the condition he was found in, it was reasonable for Officer Smith to infer that defendant was sexually interested in children and that he had recently masturbated to images of children in sexually suggestive poses. See State v. Davis, 149 N.H. 698, 701–02 (2003) ("[T]he expertise and experience of the law enforcement officer [is] relevant to the probable cause determination. Officers are entitled to draw reasonable inferences from the facts available to them in light of their knowledge and prior experience."); see also Ornelas v.

United States, 517 U.S. 690, 700 (1996) (The United States Supreme Court has "recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists") (citing United States v. Ortiz, 422 U.S. 891, 897 (1975)).

Accordingly, when viewing the above facts and reasonable inferences in a common-sense manner, the Court finds the affidavit established a fair probability that evidence of child pornography would be found on defendant's computer and hard drive. See Letoile, 166 N.H. at 274 ("Probable cause does not require conclusive proof of illegal activity—instead, the magistrate determines, in light of the affidavit provided, whether there is a 'fair probability' that contraband will be found in a particular place.").

Defendant nevertheless argues that the affidavit did not adequately describe the underage girls in the photographs and therefore the magistrate was unable to make an independent determination as to their ages. The Court again disagrees. "The determination of the age of the subjects in each photograph is for the trier of fact, relying on 'everyday observations and common experiences.'" State v. Cobb, 143 N.H. 638, 646 (1999). "In determining child pornography, based upon its everyday experiences, a trier of fact can determine from a photograph whether a child is under the age of sixteen." Id. Here, much like the trier of fact in a possession of child pornography trial, the officers used their common experiences and everyday observations to identify the girls' ages in the photographs as between the ages of six and fifteen years. In making his ultimate determination of probable cause, the Court finds the magistrate reasonably relied upon this assessment.

Accordingly, to the extent defendant seeks to suppress the evidence seized from his electronics pursuant to the search warrant, his motion is again DENIED.

Conclusion

Consistent with the foregoing, defendant's motion to suppress is DENIED in its entirety.

SO ORDERED.

1/6/17
DATE

Kenneth C. Brown
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **State v. Robert Norman**
Case Number: **216-2016-CR-00787**

Please be advised that on March 22, 2017 Judge Brown made the following order relative to:

Motion to Reconsider

"After review, motion denied"

March 29, 2017

W. Michael Scanlon
Clerk of Court

(832)

C: Michael G. Valentine, ESQ; Kyle D. Robidas, ESQ

D.O.B. 01/31/1964
AMPD# 16-7362-AR
Cir. Ct. #
Sup. Ct. #

RSA Ch. 649-A:3,I(a)
Child Sex Abuse Image; Buy Etc
Class A Felony
7 ½ to 15 years; $4000

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT

HNSC #216 2016 CR 787
CHC # 1240142C

INDICTMENT

At the Superior Court, holden at **Manchester,** within and for the County of Hillsborough aforesaid, in the month of **June** in the year **Two Thousand Sixteen** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

ROBERT NORMAN
5 BRIARCLIFF DRIVE
MILFORD, NH 03055

on or about the **16th** day of **February 2016,** at **Amherst** in the County of Hillsborough, aforesaid, did commit the crime of **Possession of Child Sexual Abuse Images** in that **he knowingly bought, procured, possessed, or controlled any visual representation of a child engaging in sexually explicit conduct, specifically, a file identified as thCA517BF0.jpg depicting a prepubescent girl with flowers in her hair posing naked;** contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/15/16
Date

Foreperson

Dennis C. Hogan
Hillsborough County Attorney

by:
Michael G. Valentine #16506
Assistant County Attorney

D.O.B. **01/31/1964**
AMPD# 16-7362-AR
Cir. Ct. #
Sup. Ct. #

RSA Ch. **649-A:3,I(a)**
Child Sex Abuse Image; Buy Etc
Class A Felony
7 ½ to 15 years; $4000

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT

HNSC #216 2016 CR 787
CHC # 1240143C

INDICTMENT

At the Superior Court, holden at **Manchester,** within and for the County of Hillsborough aforesaid, in the month of **June** in the year **Two Thousand Sixteen** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

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MILFORD, NH 03055

on or about the **16th** day of **February 2016,** at **Amherst** in the County of Hillsborough, aforesaid, did commit the crime of **Possession of Child Sexual Abuse Images** in that **he knowingly bought, procured, possessed, or controlled any visual representation of a child engaging in sexually explicit conduct, specifically, a file identified as thCAQJFBIZ.jpg depicting a prepubescent girl lying on her side displaying her genitals;** contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/15/16
Date

Foreperson

Dennis C. Hogan
Hillsborough County Attorney

by:
Michael G. Valentine #16506
Assistant County Attorney

-2

D.O.B. **01/31/1964**
AMPD# 16-7362-AR
Cir. Ct. #
Sup. Ct. #

RSA Ch. **649-A:3,I(a)**
Child Sex Abuse Image; Buy Etc
Class A Felony
7 ½ to 15 years; $4000

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

~~SUPERIOR COURT~~
HNSC #216 2016 CR 787
CHC [illegible] 1240144C

INDICTMENT

At the Superior Court, holden at **Manchester,** within and for the County of Hillsborough aforesaid, in the month of **June** in the year **Two Thousand Sixteen** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

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on or about the **16th** day of **February 2016,** at **Amherst** in the County of Hillsborough, aforesaid, did commit the crime of **Possession of Child Sexual Abuse Images** in that **he knowingly bought, procured, possessed, or controlled any visual representation of a child engaging in sexually explicit conduct, specifically, a file identified as thCAP99NQL.jpg depicting a prepubescent girl posing naked in the water displaying her buttocks;**
contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/15/16
Date

Foreperson

after Board Email 6/16/17 Court found A not guilty 6/16/17

Dennis C. Hogan
Hillsborough County Attorney

by:

Michael G. Valentine #16506
Assistant County Attorney

D.O.B. **01/31/1964**
AMPD# 16-7362-AR
Cir. Ct. #
Sup. Ct. #

RSA Ch. **649-A:3,I(a)**
Child Sex Abuse Image; Buy Etc
Class A Felony
7 ½ to 15 years; $4000

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT

HNSC #216 2016 CR 787
CHC # 1240145C

INDICTMENT

At the Superior Court, holden at **Manchester,** within and for the County of Hillsborough aforesaid, in the month of **June** in the year **Two Thousand Sixteen** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

ROBERT NORMAN
5 BRIARCLIFF DRIVE
MILFORD, NH 03055

on or about the **16th** day of **February 2016,** at **Amherst** in the County of Hillsborough, aforesaid, did commit the crime of **Possession of Child Sexual Abuse Images** in that **he knowingly bought, procured, possessed, or controlled any visual representation of a child engaging in sexually explicit conduct, specifically, a file identified as thCAE6C16J.jpg depicting a prepubescent girl lying naked on a blanket displaying her buttocks;**

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/15/16
Date

Foreperson

Dennis C. Hogan
Hillsborough County Attorney

by: _____
Michael G. Valentine #16506
Assistant County Attorney

D.O.B. **01/31/1964**
AMPD# 16-7362-AR
Cir. Ct. #
Sup. Ct. #

RSA Ch. **649-A:3,I(a)**
Child Sex Abuse Image; Buy Etc
Class A Felony
7 ½ to 15 years; $4000

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT
HNSC #216 2016 CR 787
CHC # 1240146 C

INDICTMENT

At the Superior Court, holden at **Manchester,** within and for the County of Hillsborough aforesaid, in the month of **June** in the year **Two Thousand Sixteen** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

ROBERT NORMAN
5 BRIARCLIFF DRIVE
MILFORD, NH 03055

on or about the **16th** day of **February 2016,** at **Amherst** in the County of Hillsborough, aforesaid, did commit the crime of **Possession of Child Sexual Abuse Images** in that **he knowingly bought, procured, possessed, or controlled any visual representation of a child engaging in sexually explicit conduct, specifically, a file identified as thCA9TPYU5.jpg depicting a prepubescent girl lying on her side with a stuffed animal and flowers in her hair displaying her genitals;**
contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/15/16
Date

Foreperson

Dennis C. Hogan
Hillsborough County Attorney

by:
Michael G. Valentine #16506
Assistant County Attorney

D.O.B. **01/31/1964**
AMPD# 16-7362-AR
Cir. Ct. #
Sup. Ct. #

RSA Ch. **649-A:3,I(a)**
Child Sex Abuse Image; Buy Etc
Class A Felony
7 ½ to 15 years; $4000

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT
HNSC #216 2016 CR 787
CHC CR 1240147C

INDICTMENT

At the Superior Court, holden at **Manchester,** within and for the County of Hillsborough aforesaid, in the month of **June** in the year **Two Thousand Sixteen** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

ROBERT NORMAN
5 BRIARCLIFF DRIVE
MILFORD, NH 03055

on or about the **16th** day of **February 2016,** at **Amherst** in the County of Hillsborough, aforesaid, did commit the crime of **Possession of Child Sexual Abuse Images** in that **he knowingly bought, procured, possessed, or controlled any visual representation of a child engaging in sexually explicit conduct, specifically, a file identified as a file identified as thCA7DDVC2.jpg depicting a prepubescent girl lying on her side in the water with her legs split displaying her genitals;**
contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/15/16
Date

Foreperson

Dennis C. Hogan
Hillsborough County Attorney

by:
Michael G. Valentine #16506
Assistant County Attorney

D.O.B. **01/31/1964**
AMPD# 16-7362-AR
Cir. Ct. #
Sup. Ct. #

RSA Ch. **649-A:3,I(a)**
Child Sex Abuse Image; Buy Etc
Class A Felony
7 ½ to 15 years; $4000

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT
HNSC #216 2016 CR 787
CHC # 12401480

INDICTMENT

At the Superior Court, holden at **Manchester,** within and for the County of Hillsborough aforesaid, in the month of **June** in the year **Two Thousand Sixteen** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

ROBERT NORMAN
5 BRIARCLIFF DRIVE
MILFORD, NH 03055

on or about the **16th** day of **February 2016,** at **Amherst** in the County of Hillsborough, aforesaid, did commit the crime of **Possession of Child Sexual Abuse Images** in that **he knowingly bought, procured, possessed, or controlled any visual representation of a child engaging in sexually explicit conduct, specifically, a file identified as lsm05-01-048.jpg depicting a naked prepubescent girl straddling another naked girl;** contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/15/16
Date

Foreperson

Dennis C. Hogan
Hillsborough County Attorney

by:
Michael G. Valentine #16506
Assistant County Attorney

D.O.B. **01/31/1964**
AMPD# 16-7362-AR
Cir. Ct. #
Sup. Ct. #

RSA Ch. **649-A:3,I(a)**
Child Sex Abuse Image; Buy Etc
Class A Felony
7 ½ to 15 years; $4000

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

SUPERIOR COURT
HNSC #216 2016 CR 787
CHC # 1240149C

INDICTMENT

At the Superior Court, holden at **Manchester,** within and for the County of Hillsborough aforesaid, in the month of **June** in the year **Two Thousand Sixteen** the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE,** on their oath, present that

ROBERT NORMAN
5 BRIARCLIFF DRIVE
MILFORD, NH 03055

on or about the **16th** day of **February 2016,** at **Amherst** in the County of Hillsborough, aforesaid, did commit the crime of **Possession of Child Sexual Abuse Images** in that **he knowingly bought, procured, possessed, or controlled any visual representation of a child engaging in sexually explicit conduct, specifically, a file identified as ca19379.jpg depicting a prepubescent girl posing naked on a red carpet with her feet spread displaying her genitals;**
contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

6/15/16
Date

Foreperson

Dennis C. Hogan
Hillsborough County Attorney

by:
Michael G. Valentine #16506
Assistant County Attorney

1-8

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT

HILLSBOROUGH, SS. October Term, 2016

STATE OF NEW HAMPSHIRE

v.

ROBERT NORMAN
#216-16-787

MOTION TO SUPPRESS

NOW COMES the defendant, Robert Norman, by and through counsel, Gregory M. Albert and Kyle Robidas, and respectfully requests this Honorable Court to suppress all evidence from a search of Mr. Norman's computer and hard drive due to an unlawful search warrant. Mr. Norman also requests this Court suppress all statements from a custodial interrogation prior to arrest. This motion is based on Mr. Norman's rights under Part 1, Articles 15 and 19 of the New Hampshire Constitution, and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. In support of this motion, the following is stated:

FACTS

1. Mr. Norman is charged with eight felony counts of Possession of Child Sex Abuse Images and one misdemeanor count of Indecent Exposure or Lewdness.
2. On February 16, 2016, members of the Hillsborough County Sheriff's Office Street Crimes Task Force ("Task Force") were conducting surveillance in the Walmart parking lot in Amherst. The officers observed a man parked in the lot with the car's engine running. The male appeared to be passed out or sleeping.

3. Detective Nicholas Skiba arrived at the scene, and Officer Audet, Lieutenant Newcomb, Officer Palmer, Officer Johnson, Officer Marcellino, and Sergeant O'Donnell were already on scene. In total, at least seven officers were on scene as part of the investigation. These officers are all members of the Task Force.
4. The subject appeared to either be asleep or passed out in the truck, and the officers woke him up to speak to him. Later investigation identified the subject as Robert Norman, the defendant in this case.
5. Upon making contact with Mr. Norman in the truck, the police noticed a photo on the Mr. Norman's open computer screen which was a "partially nude adult female, in a provocative position."
6. When the officers approached his vehicle, Mr. Norman was not wearing pants and told the officers he was changing when the officers walked up.
7. Officer Johnson obtained consent from Mr. Norman to search his laptop, and Officer Johnson began looking through images on the computer.
8. Officer Johnson found "countless images of clear pornographic images, but amongst them were images of young girls, clearly under the age of 10, mixed in amongst the porn photos." The "countless images of clear pornographic images" were ostensibly of adults as the officer later described the photos of individuals he believed to be underage.
9. The officer described these individuals, believed to be underage, in the photos as wearing "sundresses, and cheerleading outfits, and all posing for the photo." The officer specifically noted that there was "nothing erotic about the images themselves just the manner in which they were found amonst [sic] the other clear erotic photos."

10. When questioned about those images, Mr. Norman stated he didn't know any of the individuals in the photos but that he had a fetish for such things, including images of younger females wearing pantyhose or tights.
11. Mr. Norman was subsequently charged with Indecent Exposure or Lewdness, and his computer, cell phone, and separate hard drive were seized and transported to the Amherst Police Department.
12. According to Hillsborough County Sheriff Detective James Johnson, upon placing Mr. Norman under arrest, the police "stopped the consent search."
13. Mr. Norman also later withdrew his consent to search his devices and refused to provide passcodes to enter the devices and look further at his devices as part of his interview at the police station.
14. Subsequent to his arrest, Detective Matthew Fleming of the Bedford Police Department, also a member of the Internet Crimes Against Children Task Force (ICAC), interviewed Mr. Norman. Mr. Norman denied that any of his devices contained child pornography.
15. Detective Fleming secured the devices in a faraday bag and awaited a search warrant.
16. On February 17, 2016, Amherst Officer John Smith drafted a search warrant for the search of "Norman's external hard drive, cell phone, and computer."
17. This search warrant was reviewed by the commander of the New Hampshire ICAC, Sergeant Tom Grella. In Sergeant Grella's opinion, there was "no crime of child pornography and therefore no probable cause to grant a search warrant."
18. Despite the view of the commander of the task force that there was insufficient probable cause for the search warrant, Chief Reams chose to apply for the search warrant anyway.

19. Officer Smith submitted the search warrant on February 19, 2016 to Judge Ryan who was then sitting in the Milford District Court. See Exhibit A (Application for Search Warrant and Return).

20. The officer requested and was granted a search warrant for the following property: "all files, data, call logs, images, etc. from Robert Norman's Sony laptop, Motorola cell phone, and Seagate external hard drive" based on the officer's assertion that the property "contain[ed] evidence of the crime of Possession of Child Sexual Abuse Images."

21. Importantly, nowhere in the affidavit did Officer Smith describe images of child pornography nor did Officer Smith provide images of alleged child pornography to the judge as part of the probable cause determination. In fact, that opportunity would not have presented itself because no child pornography images were found prior to the issuance of the search warrant.

22. The only images supposedly depicting children were of individuals clothed in "sundresses, and cheerleading outfits, and all posing for the photo," as described by the ICAC Task Force's reports.

ARGUMENT

MR. NORMAN WAS IN THE FUNCTIONAL EQUIVALENT OF CUSTODY AT THE TIME OF QUESTIONING.

23. In response to interrogation while at the scene, Mr. Norman told the police that the clothed photos of individuals suspected by the police to be children were not of his nieces or nephews, and he did not have any images of his family members on the computer.

24. He further told the police that he had these photos of the individuals wearing "pantyhose, or stockings, that he had a fetish for such things."

25. "Custody entitling a defendant to Miranda protections requires formal arrest or restraint on freedom of movement to the degree associated with formal arrest." State v. Jennings, 155 N.H. 768, 772 (2007) (quoting State v. Turmel, 150 N.H. 377, 382–83 (2003)).

26. In order for the State to use statements subject to custodial interrogation against him, the "State must prove, beyond a reasonable doubt, that it did not violate [his] constitutional rights under Miranda." State v. Gribble, 165 N.H. 1 (2013).

27. In the absence of formal arrest, the court must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation. Jennings, 155 N.H. at 772.

28. Factors to be considered include "the suspect's familiarity with his surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the interview's duration and character." Id. (quoting State v. Grey, 148 N.H. 666, 670 (2002)).

29. The facts surrounding Mr. Norman's encounter with the seven officers strongly suggest that Mr. Norman's freedom of movement was restrained.

30. First, there is no evidence that Mr. Norman was familiar with his surroundings, specifically the Walmart parking lot in Amherst, at the time of his questioning in this case.

31. Second, Mr. Norman was apprehended by seven officers. It is unclear from reports whether any of the seven officers were in uniforms, but the presence of seven officers likely created a vulnerable position for Mr. Norman. Further, given the standards for law

enforcement in New Hampshire, it is likely that all seven officers were carrying firearms visibly on their person.

32. Third, the encounter was sudden and unexpected. Mr. Norman had just been awakened by the officers. Several officers surrounded his truck and began to ask him questions. The officers requested to search his computer, and the officers continued to ask Mr. Norman questions about the contents of his computer.

33. This interaction is similar to State v. McKenna, 166 N.H. 671 (2014). In McKenna, the officers stopped the defendant from moving freely about his property. Id. at 678. The defendant officers did not allow McKenna to leave the area to enter the woods without remaining within the presence of the officer. Id. In the present case, Mr. Norman wasn't even given the opportunity to walk away from his truck with an officer next to him. As in McKenna, the officers' actions "would have conveyed to a reasonable person the reality that the officers did not intend to allow the defendant to leave their sight." Id. (quoting Stansbury v. California, 511 U.S. 318, 325 (1994)).

34. Fourth, the officers never told Mr. Norman that he was free to leave or that he was not under arrest.

35. Officers never informed Mr. Norman that he was free to leave, which presents a dramatically different scenario from State v. Johnson, 140 N.H. 573 (1995). In that case, the court found that the defendant's encounter was noncustodial after considering the brevity of the encounter and the fact that the trooper informed him that "he was free to leave after a search of his person". Id. at 578.

36. The McKenna Court noted that informing a suspect of his ability to terminate the interrogation has long been a factor that weighs against a finding of custody. The Court specifically discussed the history, noting:

> "[T]he extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will often defines the custodial setting. Conversely, the lack of a police advisement that the suspect is at liberty to decline to answer questions or free to leave is a significant indication of a custodial detention." Indeed, our cases reflect that we have consistently regarded as a significant factor in our custody analysis whether a suspect is informed that he or she is at liberty to terminate the interrogation. See State v. Locke, 149 N.H. 1, 7, 813 A.2d 1182 (2002) ("Given the repeated advice that he was free to leave, we conclude that a reasonable person in the defendant's position would not believe that he was restrained to the degree associated with formal arrest."); State v. Hammond, 144 N.H. 401, 404, 742 A.2d 532 (1999) (finding no custody, based, in part, upon fact that officers informed the defendant several times that he was not under arrest and that he was free to leave at any time); State v. Johnson, 140 N.H. 573, 578, 669 A.2d 222 (1995) (finding no custody, in part, based upon fact that trooper informed defendant he was free to leave) (internal citations omitted).
>
> McKenna, 166 N.H. at 680.

37. The McKenna Court focused heavily on the lack of evidence the suspect was told he was free to terminate the interrogation. 166 N.H. at 680 (noting "notwithstanding the fact that the defendant was told that he was not under arrest, the lack of evidence that he was free to terminate the interrogation supports a finding of custody at some point during the interrogation.").

38. Therefore, Mr. Norman was under the functional equivalent of arrest, and was therefore entitled to Miranda protections.

THE POLICE INTERROGATED MR. NORMAN WHILE HE WAS IN THE FUNCTIONAL EQUIVALENT OF CUSTODY, SO MIRANDA PROTECTIONS APPLY.

39. "Interrogation," for Miranda purposes encompasses not only "express questioning," but also "its functional equivalent." State v. Plch, 149 NH 608, 614 (2003) (quoting Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980)). Interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police know are reasonably likely to elicit an incriminatory response from the suspect." Id., quoting Innis, 446 U.S. at 301.

40. The officers did not read Mr. Norman his Miranda rights nor seek a waiver prior to questioning.

41. The officers' style of questioning also suggests that this was an interrogation. This was not a casual conversation of a "general nature" as seen in State v. Graca, 142 N.H. 670, 675 (1998). In that case, the officer had asked the defendant broad questions relating to his identity, reason for being there, and means of arrival. Id. at 671. By contrast, Mr. Norman encountered detectives in a vulnerable position (in his truck with his pants down) while they asked directed questions highly likely to elicit an incriminating response. The officers questioned Mr. Norman about the images they discovered on his computer and why he would have those individual pictures. This interaction was far from a casual conversation.

MR. NORMAN'S STATEMENTS MUST BE EXCISED FROM THE SEARCH WARRANT APPLICATION DUE TO THE POLICE'S CUSTODIAL QUESTIONING WITHOUT MIRANDA PROTECTIONS.

42. All evidence "obtained only through the exploitation of an antecedent illegality...must be suppressed." State v. Cobb, 143 N.H. 638, 650 (1999); see also Wong Sun v. United

States, 371 U.S. 471, 484-85 (1963) (holding exclusionary rule applies to direct and indirect violations of constitutional protections).

43. Additionally, this "poisonous fruit" cannot be used to establish probable cause for a search warrant. State v. Gravel, 135 N.H. 172, 184 (1991).

44. Therefore, Mr. Norman's statements while subject to custodial interrogation must be excised from the search warrant application.

THE SEARCH WARRANT APPLICATION DID NOT ESTABLISH PROBABLE CAUSE THAT EVIDENCE OF THE CRIME WOULD BE FOUND ON MR. NORMAN'S DEVICES, AND THEREFORE, THE SEARCH WARRANT WAS UNLAWFULLY GRANTED.

45. The Fourth Amendment to the United States Constitution and Part I, Article 19 of the New Hampshire Constitution require that search warrants issue only upon cause or foundation supported by oath or affirmation. State v. Dowman, 151 N.H. 162, 164 (2004) (citing State v. McMinn, 144 N.H. 34, 38 (1999)). This language requires an issuing magistrate to find probable cause. Id.

46. Probable cause is established where a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction. Id. To obtain a search warrant, the police must show that at the time of the application for the warrant there is a substantial likelihood of finding the items sought; they need not establish with certainty that the search will lead to the desired result. Id. at 164 (citing State v. Cobb, 143 N.H. 638, 652 (1999)).

47. For warrants dealing with the search and seizure of child pornography, only if there is probable cause to believe that a given image falls within the statutory definition of child pornography may a search warrant issue. U.S. v. Brunette, 256 F.3d 14, 18 (1st Cir. 2001). A judge cannot normally make this determination without either a look at the allegedly pornographic images, or at least an assessment based on a detailed factual description of them. Id. Probable cause to issue a warrant must be assessed by a judicial officer and unsupported conclusions of an investigating officer are not entitled to any weight in the probable cause determination. Id. (citing United States v. Vigeant, 176 F.3d 565, 571 (1st Cir. 1999)).

48. The Dowman case is instructive, especially as it dealt with the issue of probable cause for a search warrant in a child pornography case.

49. Dowman makes clear that there are three ways in which probable cause could be found for purposes of a search warrant for child sex abuse images: 1) an admission from the defendant that his devices contained child pornography (See United States v. Roberts, 274 F.3d 1007, (5th Cir. 2001)); 2) the police saw child pornography prior to issuance of the search warrant and the affiant was able to sufficiently describe the images to the magistrate (See Brunette, 256 F.3d 14); or 3) the police saw the images prior to issuance of the search warrant, and the affiant provided the images to the magistrate to make an independent evaluation of the images (See Brunette, 256 F.3d 14).

50. In Dowman, the Task Force conducted a two-year investigation into a Texas company known as Landslide Productions which was suspected of selling child pornography. 151 N.H. at 163. As a result of the Task Force's investigation, it obtained billing records for customers who had used credit cards to purchase items from the site. Id.

51. The investigation team in New Hampshire then made contact with Dowman and informed him that their investigation revealed that Dowman had purchased child pornography from Landslide. Id. At that point, Dowman consented to allow the officer to inspect his home computer and external disks. Id.

52. The Dowman investigator's inspection showed "numerous color thumbnail images of what appeared to be naked children." Id. His further examination of the devices revealed "numerous images of children in various naked poses as well as numerous video clips." Id.

53. Dowman was questioned, and he admitted that about 25% of the image files on his computer and disks contained child pornography. Id.

54. The investigator submitted a search warrant affidavit to the magistrate, but he did not submit any copies of the images he observed. Id. at 164.

55. The New Hampshire Supreme Court in Dowman analyzed two relevant cases in finding that probable cause for the warrant was established, United States v. Brunette, 256 F.3d 14 (1st Cir. 2001), and United States v. Roberts, 274 F.3d 1007 (5th Cir. 2001). See Dowman 151 N.H. at 165-66.

56. Dowman's appellate counsel relied on Brunette for his argument. In Brunette, the judge did not independently view the images and the Court found that the affidavit did not adequately describe the images. Brunette, 256 F.3d at 15. Instead, the Brunette trial court relied on the officer's "training and experience." Id. at 18. The Brunette court noted that "probable cause to issue a warrant must be assessed by a judicial officer, not an investigating agent." Id. at 18. The court noted that the "inherent subjectivity [in

assessing illegality] is precisely why the determination should be made by a judge, not a [federal] agent." Id.

57. The Dowman Supreme Court instead found the facts in the case to be more like Roberts. Id. at 165. In Roberts, a federal agent was informed that Roberts would be flying with a disk containing child pornography. Id. After the agent confronted Roberts regarding the contents of the disk, Roberts admitted "there was some child pornography on the diskettes". Id. Roberts further described the content as "young kids, followed by 'six'," indicating to the agent that the images were of six-year-old children. Id.

58. In Roberts, the Fifth Circuit Court of Appeals held that the defendant's admission constituted "sufficient grounds to support a finding of probable cause to execute a search or seizure of those diskettes." Id. The affidavit accompanying the Roberts warrant stated the defendant "admitted that 25% of the image files on his computer and disks contained child pornography." Id.

59. The Dowman court noted that if it "assumed that [the investigator in Dowman] did not describe the observed images in detail sufficient to meet the Brunette standard [for probable cause], the defendant's admission provided sufficient 'other indicia of probable cause.'" Id.

60. Here, none of three paths laid out in Dowman were followed by the police nor by the magistrate signing the warrant. Mr. Norman denied having child pornography on his devices, and the police found no child pornography during their initial search of the computer prior to the issuance of a warrant. As the police did not locate child pornography, they couldn't have described the images to the magistrate nor shown the images to him.

61. Further, as all of the images believed to be children were of clothed individuals, wearing "sundresses, and cheerleading outfits, and all posing for the photo," the affiant could not have been able to adequately describe the age of the individuals for the magistrate. Descriptions of the clothed individuals could not have included, and in fact did not include, information about whether the individuals had entered puberty or had other physical characteristics of children younger than 18.

62. No images of these clothed individuals were attached to the search warrant application.

63. The affiant simply concluded that the children in the photos were "estimated to [be] between the ages of 6 and 15."

64. However, the law is well-settled that a "magistrate's 'action cannot be a mere ratification of the bare conclusion of others' nor a proverbial 'rubber stamp for conclusions drawn by the police.'" United States v. Genin, 594 F. Supp 2d 412, 421 (S.D.N.Y. 2009) (internal citations omitted).

65. Federal case law on child pornography is similarly instructive, as the federal statute prohibits similar conduct to the New Hampshire statute. The federal statute prohibits, inter alia, "*lascivious* exhibition of the genitals or pubic area of any [minor] person." See 18 U.S.C. § 2256(8) (defining child pornography) (emphasis added). This subsection of the federal statute is similar in wording to the child pornography statute in the State of New Hampshire, RSA 649-A:2(III) (prohibiting, inter alia, "*lewd* exhibitions of the buttocks [or] genitals") (emphasis added).

66. Federal courts require, absent an admission, see Roberts, 274 F.3d 1007, for the law enforcement officer to "either to append the allegedly lascivious material or—given the Supreme Court's decision in New York v. P.J. Video, --to provide a description that is

sufficiently detailed for a magistrate to reach an independent legal conclusion that the material is indeed lascivious." See United States v. Battershell, 457 F.3d at 1051-53; United States v. Syphers, 426 F.3d 461, 465-66 (1st Cir. 2005); Brunette, 256 F.3d at 17-19; Jasorka, 153 F.3d at 59-60 (describing the district court's opinion but avoiding the issue); United States v. Christie, 570 F. Supp. 2d 657, 688-89 (D.N.J. 2008) (internal citations omitted).

67. Therefore, this search warrant was not properly granted as no probable cause existed to grant such a warrant.

ALL EVIDENCE SHOULD BE SUPPRESSED UNDER THE EXCLUSIONARY RULE.

68. The exclusionary rule acts as a remedy for a violation of a defendant's right to be free from unlawful searches and seizures. See Beauchesne, 151 N.H. 803, 817 (2004). It provides for the exclusion from trial of any evidence recovered from an unlawful search and seizure. Id. In New Hampshire, the exclusionary rule serves both to redress the injury to the privacy of the search victim and deter police misconduct. See State v. Canelo, 139 N.H. 376, 387 (1995).

69. In the instant case, all physical evidence was seized as a direct fruit of the illegality described above. Accordingly, all physical evidence and statements must be suppressed.

Respectfully submitted,

Gregory M. Albert, Esq. #20058
New Hampshire Public Defender
20 Merrimack Street
Manchester, NH 03101
(603) 669-7888

CERTIFICATE OF SERVICE

I, Gregory M. Albert, hereby certify that a copy of the foregoing Motion has been forwarded this 7th day of October, 2016 to ACA Michael Valentine.

Gregory M. Albert, Esq. #20058

THE STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT

HILLSBOROUGH, SS. OCTOBER TERM, 2016

STATE OF NEW HAMPSHIRE

v.

ROBERT NORMAN
216-16-787

AFFIDAVIT

NOW COMES Attorney Gregory M. Albert and states the following:

1. I am the attorney of record in the above-captioned matter.

2. I have read the facts of the defendant's Motion to Suppress and they are adduced solely on the basis of discovery provided by the State.

Respectfully submitted,

Gregory M. Albert, Esq. #20058
New Hampshire Public Defender
20 Merrimack Street
Manchester, NH 03101
(603) 669-7888

STATE OF NEW HAMPSHIRE

Subscribed and sworn to before me this 7th day of October 2016.

Justice of the Peace/Notary Public
Comm Exp 5/24/21

Exhibit A

RETURN

I received the attached search warrant on 2/19 (Month / Day) 2016 (Year) and have executed it as follows:

On 2/26 (Month / Day) 2016 (Year) At 0800 o'clock A M,

I searched SONY LAPTOP / SEAGATE HARD DRIVE (the persons and the premises searched) described in the warrant and I

left a copy of the warrant with ROBERT NORMAN'S LOCATION UNKNOWN (names of persons searched and occupant if not a person searched; describe the premises searched if occupant not present.)

at _____ (the premises searched) together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

SONY VAIO LAPTOP
SEAGATE EXTERNAL HARD DRIVE
MOTOROLA CELL PHONE

RECEIVED
FEB 26 2016
MILFORD DISTRICT COURT

This inventory was made in the presence of DEPUTY TIM MC GIBBONS MIDDLESEX CO. SHERIFF and _____

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

_____ (Signature)

Subscribed and sworn to and returned before me this 26 (Day) day of FEB 2016 (Month / Year)

_____ Justice of the Peace

Returned to Milford District Court this 26 day of FEB 2010

_____ Clerk of Court

WARRANT

The State of New Hampshire

HILLSBOROUGH, SS MILFORD DISTRICT Court

To the Sheriff, Deputy Sheriff, State Police Officer, Constable or Police Officer of any jurisdiction, city or town, within the State of New Hampshire.

Proof by affidavit (supplemented by oral statements under oath) having been made this day before

Michael J. Ryan by
(name of person authorized to issue warrant)

Officer John Smith that
(names of person or persons whose affidavits have been taken)

there is probable cause for believing that:

(certain property which has been stolen, embezzled, or fraudulently obtained; OR is intended for use or has been used as the means of committing a crime; OR is contraband; OR is evidence of the crime to which the probable cause upon which this search warrant is issued relates.)

The property contains evidence of the crime of Possession of Child Sexual Abuse Images

may be found in the possession of Amherst Police Department
(identify)

at premises located at 175 Amherst Street Amherst, NH
(specify)

We therefore command you in the daytime (or at any time of the day or night) to make an immediate search of

Amherst Police Department
(identify premises)

and of the
(occupied by A.B.)

person of
(A.B. and any other identifiable individuals with respect to whom probable cause has been established by the affidavit

for the
or supplementary testimony.)

following property: (describe property)

A files, data, call logs, images, etc. from Robert Norman's Sony laptop, Motorola cell phone, and Seagate external hard drive.

and if you find any such property or any part thereof to bring it and the person in whose possession it is found before

At
(court having jurisdiction) (location)

Dated at Merrimack this 19 day of February, 2016
(city or town) (Day) (Month/Year)

(Court seal)

Michael J. Ryan
Justice of the Merrimack Court

APPLICATION FOR SEARCH WARRANT and SUPPORTING AFFIDAVIT

(This application and affidavit to be detached by Justice issuing warrant and filed separately with the court to which the warrant is returnable.)

Instructions: A person seeking a search warrant shall appear personally before any justice, associate justice or special justice of the municipal, district or superior court and shall give an affidavit in substantially the form hereinafter prescribed. The affidavit shall contain facts, information, and circumstances upon which such person relies to establish probable cause for the issuance of the warrant and the affidavit may be supplemented by oral statements under oath for the establishment of probable cause. The person issuing the warrant shall retain the affidavit and shall make notes personally of the substance of any oral statements under oath supplementing the affidavit or arrange for a transcript to be made of such oral statements. The person issuing the search warrant shall deliver the affidavit and the notes or transcript within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit and the notes or transcript shall be attached to it and shall be filed therewith, and they shall be a public document when the warrant is returned, unless otherwise ordered by a court of record.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH (county), SS

MILFORD DISTRICT Court

February 18 (Month / Day) 2016 (Year)

I, Officer John Smith (Name of applicant) being duly sworn, depose and say:

1. I am a School Resource Officer/Senior Patrolman (describe position, assignment, office, etc.)

2. I have information, based upon:
(describe source, facts indicating reliability and credibility of source and nature of information: if based on personal knowledge, so state)

*** PLEASE SEE ATTACHED ***

Form: DSSP 27A (Rev. 09/89)

(Continue on Next Page if Necessary)

Supporting Affidavit to Issue Search Warrant
Hillsborough County **Milford District Court**

I , Officer John Smith, being duly sworn do depose and state the following:

That I am a Senior Patrolman with the Amherst Police Department and have been employed as such since August of 2002. That prior to my employed with the Amherst Police Department, I was employed as a certified full time police officer with the Morganton Department of Public Safety (Morganton, NC) from December 1998 through August 2002. I am currently assigned to Souhegan High School as their School Resource Officer, and have worked in that capacity since September 2004.

I have received specialized training during my time in the Basic Law Enforcement Training academy (1998), Laws of Arrest, Search, and Seizure (1999), and Fundamentals of the Investigative Process (2002). I have been trained in the digital forensic software tool Lantern. I am currently assigned to the NH Internet Crimes Against Children's (ICAC) Task Force.

That as set forth below, the factual basis for the issuance of the warrant is based upon information obtained from my own personal knowledge, observations, and beliefs; information provided by independent sources; my training and experience and the experience of other law enforcement officials assigned to this investigation.

1. On February 16, 2016, members of the Hillsborough County Street Crimes Task Force were monitoring activity in the Amherst Walmart parking.
2. The members of the team observed a pick-up truck with a male in the driver's seat, apparently passed out.
3. Concerned that they may have an overdose situation, the officer's approached the vehicle.
4. Upon approaching the vehicle, the knocked on the window and displayed their badges indicating that they were law enforcement officers.
5. The driver, later identified as Robert H. Norman III, sat up.
6. Officers then observed that Norman's pants were down around his feet his penis was exposed, and a vacuum hose was resting on his leg near his penis.
7. Also observed in the vehicle was a laptop computer, which was open, and a cell phone.
8. Displayed on the laptop computer was a partially nude adult female, in a provocative position.
9. Officers engaged in a conversation with Norman, to which he had to be asked to pull up his pants.
10. During the course of the conversation, Norman consented to a search of his laptop, cell phone, and vehicle.
11. On the laptop, there were numerous folders observed which contained images of women in various stages of undress and positions.
12. Contained amongst the images of the adult women, there were children, estimated to between the ages of 6 and 15.
13. The younger of the children were in sundresses.
14. The teenage females were in cheerleader outfits.

15. Norman, who was still detained, but not in custody, was asked about the images.
16. Norman stated that he does not have any nieces or nephews, and there are no images of family members on the computer.
17. Norman admitted that he was inclined to have images of younger females if they were wearing pantyhose or tights.
18. After further conversations, Norman was taken into custody for Indecent Exposure and Lewdness (NH RSA 645:1)
19. At the time of the arrest, Norman's cell phone, laptop computer and external hard drive were seized.
20. Norman was then transported to the Amherst Police Department.
21. After being processed on the Lewdness offense, he was interviewed by Detective Matt Flemming of the Bedford Police Department (member of the Internet Crimes Against Children Task Force and Hillsborough County Street Crimes Task Force) and Officer Jason Palmer of the Milford Police Department (member of the Hillsborough County Street Crimes Task Force).
22. During the course of the interview, Norman stated that his pants were down as a result of preparing to change his underwear when his girlfriend called.
23. Norman was asked again later about having his pants down and the image up on his laptop.
24. Norman admitted that his laptop was open with one of his images to "stimulate" himself
25. When Norman was asked if he was masturbating, he stated "not yet" with a follow up answer of "it would have been nice" if he had plans to do so.
26. Norman admitted that there were some folders on his laptop which contained pornography; adding that he estimated that there were approximately 500 images.
27. Norman also stated that the Motorola E cell phone was his, but that there were no pornography on his phone.
28. He added that the 500GB Seagate drive is used to back up his computer.
29. Norman stated that he has used the public access wifi service at the Nashua Library to access the Torrent website to download movies and televisions shows.
30. Norman stated that he uses the public access so that the downloads would not be traced back to him.
31. Norman stated that when he searches for pornography, he uses Google and Yahoo!; he claims that he did not use the Torrent network for pornography.
32. When asked specifically about the images of the children, he stated that the images sometimes appear when he searches for his fetishes; pantyhose, legs, and/or feet.
33. Norman stated that to his knowledge none of the images are of someone who is pre-teen.
34. Norman added that he likes "cheesecake pictures"; images that are meant to be a tease, not nude, but suggestive. Adding "that is what I like".
35. This description matches that of what officers observed mixed within the adult pornography observed.

36. These types of images are referred to as child erotica, which is typically a prelude to sexually explicit images of children.
37. When asked about the vacuum cleaner which was located in his vehicle, Norman stated that he uses it to clean the floor mats, so that his feet would be clean prior to putting them into his sleeping bag to sleep.
38. During the course of the investigation, it was learned that there was a prior offense for a similar situation in Salem.
39. Norman stated that he was sleeping in a parking lot in Salem, when a kid had entered the parking lot doing donuts.
40. Norman confronted the kid and gave him the finger.
41. Norman stated that Salem police responded and he was arrested for disorderly conduct.
42. Salem Police Department was contacted and the report indicated something different.
43. On August 14, 2014, Norman was arrested for Indecent Exposure/ Gross Lewdness and Disorderly Conduct.
44. The nature of the conduct in Salem was that Norman was parked in a large parking lot near some practice football fields as a result of a male holding up his middle finger to people passing by.
45. Upon approaching the vehicle, the officer observed the male looking at an open laptop with his shorts down and his penis and testicles exposed.
46. The image on the laptop was reported to be of a female I her late teens/early twenties, with a penis in her mouth.
47. Norman had told the officer that he was just changing his pants.
48. Also during this contact, officers observed a Shop Vac hose running from the rear seat to the front seat with a white liquid substance on it.
49. Towards the end of the interview with Detective Flemming, Norman was asked for the password to his laptop.
50. Norman admitted that it was a name, but would not provide said password indicating that there were banking records on his computer.

Based on these facts, there is probably cause to believe that the property hereinafter described constitutes evidence of the crime of **Possession of Child Sexual Abuse Images** contrary to **NH RSA 649-A:3** and may be found at the premises situated at 175 Amherst Street, Amherst, NH.

A. CHARACTERISTICS COMMON TO INDIVIDUALS WHO POSSESS AND/OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY

Based on my previous investigative experience related to child pornography investigations, my training, and the experience of other law enforcement officers with whom I have had discussions, I know there are certain characteristics common to individuals who utilize the internet to access with intent to view and/or possess, receive, or distribute images of child pornography:

Individuals who access with intent to view and/or possess, receive, or distribute child pornography may receive sexual gratification, stimulation, and satisfaction from contact with children, or from fantasies they may have viewing children

engaged in sexual activity or in sexually suggestive poses, such as in person, in photographs, or other visual media, or from literature describing such activity.

Individuals who access with intent to view and/or possess, receive, or distribute child pornography may collect sexually explicit or suggestive materials, in a variety of media, including photographs, magazines, motion pictures, videotapes, books, slides and/or drawings or other visual media. Individuals who have a sexual interest in children or images of children often use these materials for their own sexual arousal and gratification. Further, they may use these materials to lower the inhibitions of children they are attempting to seduce, to arouse the selected child partner, or to demonstrate the desired sexual acts.

Individuals who access with intent to view and/or possess, receive, or distribute child pornography almost always possess and maintain their "hard copies" of child pornographic material, that is, their pictures, films, video tapes, magazines, negatives, photographs, correspondence, mailing lists, books, tape recordings, etc., in the privacy and security of their home or some other secure location. Individuals who have a sexual interest in children or images of children typically retain pictures, films, photographs, negatives, magazines, correspondences, books, tape recordings, mailing lists, child erotica, and videotapes for many years.

Likewise, individuals who access with intent to view and/or possess, receive, or distribute pornography often maintain their child pornography images in a digital or electronic format in a safe, secure and private environment, such as a computer and the area immediately surrounding a computer. These child pornography images are often maintained for several years and are kept close by, usually at the possessor's residence, to enable the individual to view the child pornography images, which are valued highly.

Individuals who access with intent to view and/or possess, receive, or distribute child pornography also may correspond with and/or meet others to share information and materials; rarely destroy correspondence from other child pornography distributors/possessors; conceal such correspondence as they do their sexually explicit material; and often maintain lists of names, addresses, and telephone numbers of individuals with whom they have been in contact and who share the same interests in child pornography.

Individuals who are interested in child pornography generally have knowledge about how to access hidden and secretive cloud based locations involved with child pornography. They would likely have gained knowledge of these locations through online communication with others who possess similar interests in child pornographic materials. Other communication forums, such as bulletin boards, newsgroups, chat or chat rooms have forums dedicated to the trafficking of child pornography images. Individuals who utilize these types of forums are considered more technically advanced users and therefore more experienced in acquiring child pornography images.

Individuals who access with intent to view and/or possess, receive, or distribute child pornography typically prefer not to be without their child pornography for a

prolonged time period. This behavior has been documented by law enforcement officers involved in the investigation of child pornography throughout the world.

Based on the following, I believe that the target of this investigation likely displays characteristics common to individuals who access with intent to view and/or possess, receive, or distribute child pornography.

B. BACKGROUND ON COMPUTERS AND CHILD PORNOGRAPHY

Computers and digital technology have revolutionized the way in which individuals interested in child pornography interact with one another. Child pornography formerly was produced using cameras and film (either still photography or movies). The photographs required darkroom facilities and a significant amount of skill in order to develop and reproduce the images. There were definable costs involved with the production of pornographic images. To distribute these on any scale required significant resources. The photographs themselves were somewhat bulky and required secure storage to prevent their exposure to the public. The distribution of these wares was accomplished through a combination of personal contacts, mailings, and telephone calls.

The development of computers and digital cameras has changed this. Computers basically serve four functions in connection with child pornography: production, communication, distribution, and storage.

Individuals who access with intent to view and/or possess, receive, or distribute child pornography can now transfer printed photographs into a computer-readable format with a device known as a scanner. Furthermore, with the advent of digital cameras, when the photograph is taken it is saved as a digital file that can be directly transferred to a computer by simply connecting the camera to the computer. In the last ten years, the resolution of pictures taken by digital cameras has increased dramatically, meaning the photos taken with digital cameras have become sharper and crisper. Photos taken on a digital camera are stored on a removable memory card in the camera. These memory cards often store many gigabytes of data, which provide enough space to store thousands of high-resolution photographs. Video camcorders that once recorded video onto tapes or mini-CDs can now save video footage in a digital format directly to a hard drive in the camera. The video files can be easily transferred from the camcorder to a computer.

A device known as a modem allows any computer to connect to another computer through the use of a telephone, cable, or wireless connection. Electronic contact can be made to literally millions of computers around the world. The ability to produce child pornography easily, reproduce it inexpensively, and market it anonymously (through electronic communications) has drastically changed the method of distribution and receipt of child pornography. Child pornography can be transferred via electronic mail or through file transfer protocols (FTPs) to anyone with access to a computer and modem. Because of the proliferation of commercial services that provide electronic mail service, chat services (i.e.,

"Instant messaging"), and easy access to the Internet, the computer is a preferred method of distribution and receipt of child pornographic materials.

The computer's ability to store images in digital form makes the computer itself an ideal repository for child pornography. The size of the electronic storage media (commonly referred to as the hard drive) used in home computers has grown tremendously within the last several years. These drives can store thousands of images at very high resolution. In addition, there are numerous options available for the storage of computer or digital files. One-terabyte (1000 gigabytes) external and internal hard drives are not uncommon. Other media storage devices include CDs, DVDs, and "thumb," "jump," or "flash" drives, which are very small devices which are plugged into a port on the computer. It is extremely easy for an individual to take a photo with a digital camera, upload that photo to a computer, and then copy it (or any other files on the computer) to any one of those media storage devices. (CDs and DVDs are unique in that special software must be used to save or "burn" files onto them.)

The Internet affords individuals several different venues for obtaining, viewing, and trading child pornography in a relatively secure and anonymous fashion.

Individuals also use online resources to retrieve and store child pornography, including services offered by Internet Portals such as Yahoo!, Hotmail, Gmail, AOL, among others. The online services allow a user to set up an account with a remote computing service that provides e-mail services as well as electronic storage of computer files in any variety of formats. A user can set up an online storage account from any computer with access to the Internet. Even in cases where online storage is used, however, evidence of child pornography can be found on the user's computer or external media in most cases.

As is the case with most digital technology, communications by way of computer can be saved or stored on the computer used for these purposes. Storing this information can be intentional, i.e., by saving an e-mail as a file on the computer or saving the location of one's favorite websites in, for example, "bookmarked" files. Digital information can also be retained unintentionally, e.g., traces of the path of an electronic communication may be automatically stored in many places (e.g., temporary files or ISP client software, among others). In addition to electronic communications, a computer user's Internet activities generally leave traces or "footprints" in the web cache and history files of the browser used. Such information is often maintained indefinitely until overwritten by other data.

C. SPECIFICS OF SEARCH AND SEIZURE OF COMPUTER SYSTEMS

Searches and seizures of evidence from computers commonly require officers or agents to download or copy information from the computers and their components, or seize most or all computer items (computer hardware, computer software, and computer related documentation) to be processed later by a qualified computer expert in a laboratory or other controlled environment. This is almost always true because of the following reasons:

Computer storage devices (like hard disks, diskettes, tapes, laser disks, magneto optical, and others) can store the equivalent of thousands of pages of information. Especially when the user wants to conceal criminal evidence, he or she often stores it in random order with deceptive file names. This requires searching authorities to examine all the stored data that is available in order to determine whether it is included in the warrant that authorizes the search. This sorting process can take days or weeks, depending on the volume of data stored, and is generally difficult to accomplish on-site.

Searching computer systems for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment. The vast array of computer hardware and software available requires even computer experts to specialize in some systems and applications, so it is difficult to know before a search which expert should analyze the system and its data. The search of a computer system is an exacting scientific procedure that is designed to protect the integrity of the evidence and to recover even hidden, erased, compressed, password-protected, or encrypted files. Since computer evidence is extremely vulnerable to tampering or destruction (which may be caused by malicious code or normal activities of an operating system), the controlled environment of a laboratory is essential to its complete and accurate analysis.

In order to fully retrieve data from a computer system, the analyst needs all magnetic storage devices as well as the central processing unit (CPU). In cases involving child pornography where the evidence consists partly of graphics files, the monitor(s) may be essential for a thorough and efficient search due to software and hardware configuration issues. In addition, the analyst needs all the system software (operating systems or interfaces, and hardware drivers) and any applications software which may have been used to create the data (whether stored on hard drives or on external media).

Furthermore, because there is probable cause to believe that the computer and its storage devices are all instrumentalities of crimes, within the meaning of NH RSA 649-A:3 *and/or* 18 U.S.C. §§ 2251 through 2256, they should all be seized as such.

D. SEARCH METHODOLOGY TO BE EMPLOYED

The search procedure of electronic data contained in computer hardware, computer software, and/or memory storage devices may include the following techniques (the following is a non-exclusive list, as other search procedures may be used):

1. On-site triage of computer systems to determine what, if any, peripheral devices or digital storage units have been connected to such computer systems, a preliminary scan of image files contained on such systems and digital storage devices to help identify any other relevant evidence or potential victims, and a scan for encryption software;

2. On-site forensic imaging of any computers that may be partially or fully encrypted, in order to preserve unencrypted electronic data that may, if not immediately imaged on-scene, become encrypted and accordingly unavailable for examination; such imaging may require several hours to complete and require law enforcement agents to secure the search scene until that imaging can be completed;

3. Examination of all of the data contained in such computer hardware, computer software, or memory storage devices to view the data and determine whether that data falls within the items to be seized as set forth herein;

4. Searching for and attempting to recover any deleted, hidden, or encrypted data to determine whether that data falls within the list of items to be seized as set forth herein (any data that is encrypted and unreadable will not be returned unless law enforcement personnel have determined that the data is not (1) an instrumentality of the offenses, (2) a fruit of the criminal activity, (3) contraband, (4) otherwise unlawfully possessed, or (5) evidence of the offenses specified above);

5. Surveying various file directories and the individual files they contain;

6. Opening files in order to determine their contents;

7. Scanning storage areas;

8. Performing key word searches through all electronic storage areas to determine whether occurrences of language contained in such storage areas exist that are likely to appear in the evidence described in Addendum to Attachment A; and

9. Performing any other data analysis technique that may be necessary to locate and retrieve the evidence.

E. WARRANT TIME FRAME

The logistics in executing a search warrant in this type of investigation requires detailed coordination not only with New Hampshire State Police investigators but also often with other Law Enforcement agencies that have specialized knowledge, expertise and equipment. Therefore I request this Honorable Court authorize the full seven (7) days from the date of issuance, for the service and return of this search warrant as allowed under RSA 595-A:7.

F. CONCLUSION

Based on the foregoing, there is probable cause to believe that NH RSA 649-A:3; 649-B-4 *and/or* 18 U.S.C. § 2252(a)(4)(B) (Possession of Child Sexual Abuse Images; Certain

uses of Computer Services Prohibited and Access with Intent to View Child Pornography), has been violated, and that evidence, fruits and instrumentalities of the offense. I respectfully request that this Court issue a search warrant authorizing the seizure and search of the items described in the location listed in this warrant.

Based on the information obtained, I am requesting the following three separate Search Warrants:

Device(s) or location(s) to be searched

I know from training and experience that those who have possessed and/or disseminated child pornography have an interest or preference in the sexual activity of children. Those who have demonstrated an interest or preference in sexual activity with children or in sexually explicit visual images depicting children are likely to keep secreted, but readily at hand, sexually explicit visual images depicting children. In some instances, these depictions are actual photographs or images of the suspect's own sexual activity with children in the past or present. In some instances, the suspect keeps these depictions as a means of plying, broaching, or titillating the sexual interested of new child victims or otherwise lowering the inhibitions of other potential child sexual partners by showing them that other children participate in this kind of activity. Still, in other instances, the depictions are a means of arousing the suspect. These depictions tend to be extremely important to such individuals and are likely to remain in the possession of or under the control of such an individual or extensive time periods. Although he/she might, a person who has this type of material is not likely to destroy the collection. These sexually explicit visual images depicting children can be in the form of, but not limited to, negatives, slides, books, magazines, videotapes, photographs or other similar visual reproduction, or by an image/video depictions by computer. Often times collectors of this type of material will carry I upon their person in form of USB drives or other media storage devices.

I know from training and experience that person trading in, receiving, distributing or possession images or movies involving child pornography will make copies of those files on their computers'' hard drive or other removable media.

I know from my training and experience that even if the files were deleted by a user, they still may be recoverable by a trained computer forensic analyst.

I know from training and experience that person trading in, receiving, distributing or possessing images or movies involving the exploitation of children or those interested in the actual exploitation of children often communicate with others through correspondence or other documents (whether digital or written) which could tend to identify the origin of the images as well as provide evidence of a person's interest in child pornography or child exploitation.

I know from training and experience that files related to the exploitation of children found on computers are usually obtained from the Internet using application software which often leaves files, logs, or file remnants which would tend to show the exchange, transfer, distribution, possession or origin of the files.

I know from training and experience that computers used to access the Internet usually contain files, logs or file remnants which would tend to show ownership and use of the computer as well as ownership and use of Internet service accounts used for the Internet access.

This affiant believes and has probable cause to believe that the evidence that I seek permission to seize and analyze, consisting of the above-referenced computer systems located at the above referenced address, all are directly associated with the stated facts and all constitute evidence of violations of New Hampshire RSA 649-A and 649-B. Therefore I seek permission to seize and analyze the above referenced computer systems.

The information and property that I seek the issuance of a search warrant is as follows:

- One Sony laptop computer
- One Motorola cellular telephone
- Once Seagate external hard drive

And to transport the Computer System to a secure location and, there, to EXAMINE said Computer System for the following evidence:

- Computer access codes, passwords and/or protocols.
- All tangible copies or excerpts from visual images of persons under 18 engaged in sexual conduct as more specifically described in RSA 649-A and 649-B (i.e., child pornography and obscene matter).
- All documents, whether in paper or electronic form, and computer data that is evidence of the person who had ownership of, access to, used and/or had control over the computer system.
- All documents, whether in paper or electronic form, and computer data that is evidence of sexually themed communication involving children or sexually themed writings involving children.
- All documents, whether in paper or electronic form, and computer data that is evidence of downloading files depict visual images of person under 18 engaged in sexual conduct as more specifically described in RSA 649-A and 649-B (i.e., child pornography and obscene matter).

That based upon by training and experience and the foregoing information, I have reason to believe that said devices has evidence of the above listed crimes.

Therefore I request that the 9th Circuit Court – Milford issue a search warrant to search that above described devices for records which are evidence of the crime of **Possession of Child Sexual Abuse Images** contrary to **RSA 649-A:3**.

Officer John H. Smith

2/19/16
Date

3. Based upon the foregoing information there is probable cause to believe that the
(strike out if not applicable)

property hereinafter described Is evidence of the crime of Possession of Child Sexual Abuse Images
(has been stolen, etc.)

and may be found In the possession of the Amherst Police Department
(in the possession of A.B. or any other person)

at premises 175 Amherst Street Amherst, NH
(identify)

4. The property for which I seek the issuance of a search warrant is the following:
(here described the property as particularly as possible)

A files, data, call logs, images, etc. from Robert Norman's Sony laptop, Motorola cell phone, and Seagate external hard drive.

Wherefore, I request that the court issue a warrant and order of seizure, authorizing the search of, _____

(identify premises and the persons to be searched)

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

_____
(Name)

Then personally appeared the above named John Smith

and made oath that the foregoing affidavit by him subscribed is true.

Before me this 1st (Day) day of February 2016 (Month / Year)

_____

Justice of the Peace Court

(Court seal)

My commission expires March 31, 2016

Amherst Police Department

Then personally appeared the above-named John H. Smith and acknowledged the foregoing to be true, to the best of his information, knowledge, and belief, and this instrument to be his free act and deed, before me

Feb 19th 2016 @ 0934

Date and Time

~~Justice~~ / Justice of the Peace
My commission expires 3/20/2018

And, I, Michael J. Ryan have personally examined the affidavit in support of the search warrant and any information contained in the above affidavit, ~~and have orally examined the above applicant~~. Based upon such information I conclude there ✓ is, ____ ~~is not~~, sufficient probable cause for the issuance of the search warrant sought. Therefore, the application is ✓ granted, ____ ~~denied~~ and the search warrant ✓ is, ____ ~~is not~~ issued.

Justice of the 9th Circuit Court - Milford
Michael J. Ryan

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
DOCKET No. 216-2016-CR-00787

SUPERIOR COURT
NORTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

ROBERT NORMAN

STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, with this objection to the Defendant's Motion to Suppress, stating in support:

FACTS

1. The defendant, Robert Norman, is charged with eight counts of Possession of Child Sexual Abuse Images, and one count of Indecent Exposure and Lewdness. These charges arose from the following facts taken from the reports of the Hillsborough County Sheriff's Office.

2. On February 16, 2016, members of the Hillsborough County Sheriff's Office Street Crimes Task Force were monitoring activity in the parking lot of Walmart in Amherst, NH. The officers noticed a pick-up truck, parked in the parking lot, with a male operator, who appeared to be passed out.

3. Concerned that the driver may have overdosed on narcotics, the officers approached the vehicle and knocked on the window, displaying their badges. The operator, later identified as the defendant, sat up. The officers then noticed that the defendant's pants were down around his ankles, and his penis was exposed. There was a vacuum hose resting on his leg next to his penis as well. Also observable in the vehicle was a laptop computer, which was

displaying a partially nude adult female, in a provocative position. There was also a cell phone visible in the vehicle.

4. The officers asked the defendant to pull up his pants, and if it would be ok for them to search the laptop, cell phone, and vehicle. The defendant consented. While searching the laptop, officers noticed there were numerous folders which contained images of women in various stages of undress and position. Contained amongst the images of adult women, there were children, estimated to be between the ages of 6 and 15. The children were in sundresses and cheerleader outfits.

5. The officers asked the defendant about the images. The defendant denied that the images were of any nieces or nephews, and stated there are no images of family members on the computer. When asked about the younger photos, the defendant stated that he had a fetish for pantyhose or tights, and that's why he would have them. The defendant was then placed under arrest, and his laptop, cell phone, and external hard drive were closed and seized.

6. After being transported to the Amherst Police Department, Detective Flemming of the Bedford Police Department, and Officer Palmer of the Milford Police Department interviewed the defendant. The defendant admitted that his laptop was open with one of his images to "stimulate" himself. He also stated that there were some folders on his laptop which contained pornography; an estimated 500 images. When asked about the images of children, the defendant stated that they sometimes appear when he searches for his fetishes (pantyhose, legs, and/or feet). The defendant also stated that he likes "cheesecake pictures" (images that are not nude, but are meant as a tease/suggestive). This description matched what was found on the computer earlier. The officers asked for the defendant's password to his computer so that they may continue searching it, and the defendant refused, effectively repealing his prior consent.

7. Upon reviewing the defendant's criminal history, it was noted that on August 14, 2014, he was found in a similar situation (in his truck, in a parking lot, with his pants around his feet). Officers in that case also saw the vacuum hose next to the defendant in the vehicle, with a white liquid substance on the end of the hose.

8. A search warrant was drafted and submitted to Merrimack District Court, and Judge Ryan signed the search warrant finding probable cause for the search. Within the search warrant affidavit, Officer Smith described the characteristics common to individuals who possess child pornography, which detail similarities between those individuals and what had been discovered in possession of the defendant.

9. On or about October 7, 2016, the defendant filed a Motion to Suppress. In his Motion, the defendant states that he was in the functional equivalent of custody while he was questioned at the scene, and the statements the defendant made during that time were thus obtained through a violation of the defendant's Miranda rights. Additionally, the defendant argues that the search warrant application did not establish probable cause, and thus unlawfully granted. The State objects.

LEGAL ANALYSIS

I. The Defendant Was Not Subjected To Custodial Interrogation At The Time He Made Statements At The Scene, And Thus Miranda Did Not Apply

10. The procedural safeguards established by the United States Supreme Court in Miranda v. Arizona apply only to *custodial interrogation.* 384 U.S. 436, 478 (1966) (emphasis added). "[W]here a person is not subject to a custodial interrogation, the obligation on the part of the police to issue Miranda rights does not attach." State v. Carroll, 138 N.H. 687, 696 (1994); Graca, 142 N.H. at 675; see State v. Gravel, 135 N.H. 172, 176 (1991). "Interrogation for Miranda purposes occurs where 'a person in custody is subjected to either express questioning or

its functional equivalent.'...The functional equivalent of interrogation includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" State v. Spencer, 149 N.H. 622, 625, (2003) (citations omitted) (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)). "Before a defendant's statements made during a custodial interrogation may be used as evidence against him, the State must prove beyond a reasonable doubt that he was warned of his constitutional rights, that he waived those rights, and that any subsequent statements were made knowingly, voluntarily, and intelligently." State v. Johnson, 140 N.H. 573, 577 (1995). However, where a person is not subject to a custodial interrogation, the defendant's right to Miranda warnings does not attach. State v. Carroll, 138 N.H. 687, 696 (1994).

11. Whether a defendant is in custody for purposes of Miranda is essentially a question of fact, and the trial court's finding will be upheld unless contrary to the manifest weight of the evidence or the result of an error of law. State v. Cook, 148 N.H. 735, 740 (2002). A person is in custody if formally arrested or restrained to the degree associated with formal arrest. Id. If there has been no formal arrest, the trial court must determine the degree to which the suspect's freedom of movement was curtailed, and how a reasonable person in the suspect's position would have understood the situation. State v. Johnson, 140 N.H. 573, 578 (1995). To determine whether a reasonable person in the defendant's position would think he or she was in custody under this standard, the trial court reviews the totality of the circumstances of the encounter, including but not limited to, "the suspect's familiarity with his surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the

interview's duration and character." State v. Graca, 142 N.H. 670, 675 (1998); State v. Carpentier, 132 N.H. 123, 126 (1989).

12. "[A] defendant is not 'in custody' for Miranda purposes merely because his freedom of movement has been curtailed so that he has been 'seized' in a fourth amendment sense." Johnson, at 578 (citing Berkemer v. McCarty, 468 U.S. 420, 439, 441-42 (1984)). In addition, a defendant's status as a suspect does not convert an interview into a custodial interrogation. State v. Portigue, 125 N.H. 352, 362 (1984). Therefore, Miranda warnings are not required simply because the questioned person is one whom the police suspect. Id. The locus of police questioning is not determinative of custody, either. Compare Cook, 148 N.H. at 740 (defendant not in custody when he spoke with officers in a private area at the defendant's place of employment) and State v. Pehowic, 147 N.H. 52, 55 (2001) (defendant not in custody for Miranda purposes even though he was incarcerated) with State v. Mitchell, 113 N.H. 542, 543 (1973) (defendant in custody in police cruiser when he was handcuffed, told he was under arrest and transported to the police department) and Kaupp v. Texas, 538 U.S. 626, 632-633 (2003) (defendant was in custody in his bedroom when he was awakened at 3:00 a.m., told by police that "we need to go and talk," taken to a police cruiser in handcuffs, in underwear, without shoes, to a crime scene and then the police station).

13. Finally, a non-custodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that even in the absence of any formal arrest or restraint on freedom of movement the questioning took place in a "coercive environment," because any interview of one suspected of a crime by a police officer will have coercive aspects to it. Id. For instance, Miranda requirements are not imposed simply because the questioning takes place in the station house. Id.

14. Here, the defendant was not in custody for purposes of Miranda when he was first being questioned by police. At this point the officers were interviewing the defendant as he was sitting in his car with his pants around his feet. The officers had reasonably suspected that a crime had occurred and that the defendant was in danger based upon the condition they originally saw the defendant in (that he was passed out in the driver's seat, and may have potentially overdosed on narcotics). Upon waking the defendant to see if he was ok, the officers noticed his pants around his feet and the computer displaying a partially nude adult female in a provocative position. The defendant was then asked to pull up his pants and exit the vehicle. It was at this time that the officers asked permission to search the computer, and began asking the defendant questions about the images found. The defendant was not instructed that he was under arrest, or that his freedom had been restrained. Once the defendant voluntarily told the police what types of photos were on the computer, he was placed under arrest. As was the case in both Cook and Pehowic, this clearly does not meet the standards set forth to establish any type of custodial interrogation.

15. The defendant argues that there is no evidence that he was familiar with his surroundings, specifically the Walmart Parking lot. In the establishing case, State v. Jennings, the defendant was taken to another location (the police station), where the surroundings were obviously unfamiliar to the defendant. Jennings, 155 N.H. 768, 774 (2007). However, in the instant case, the defendant was questioned inside and immediately outside of his vehicle, which he chose to park in the Walmart parking lot. It is unreasonable to argue that this location was unfamiliar to the defendant, seeing as it was his choice to be in that location.

16. The defendant also argues that he was restrained in custody under circumstances similar to State v. McKenna, 166 N.H. 671 (2014) which explains that an officer must inform a

suspect that he is not under arrest and free to leave at any time. 166 N.H. 671 (2014). However, the current facts are much closer to those in State v. Beausoleil. 2015 WL 11181927 (attached). Unlike in McKenna, but similar to Beausoleil, the officers did not already have a search warrant and the defendant was "...the subject of an investigatory stop at the time of the interrogation." Beausoleil, at 3.

> A defendant is not in custody merely because his freedom of movement has been curtailed pursuant to an investigatory stop. While the subject of the stop may be 'seized' for purposes of Part I, Article 19, the seizure does not constitute 'custody' for purposes of Miranda so long as the detention does not exceed the scope of a lawful investigatory stop."

Id. (citation omitted).

17. Additionally, in McKenna the Court distinguishes its facts from State v. Turmel, 150 N.H. 377 (2003), stating that the facts in McKenna were not similar to an investigatory traffic stop as the defendant was questioned for over an hour, at the police station, about an event that happened 9-14 hours earlier. McKenna, 166 N.H. at 680-681. The Court specifically distinguishes "an investigatory traffic stop, during which the police may temporarily seize a suspect for a period no longer than is necessary to confirm or dispel an officer's suspicions of criminal conduct," from the "restraint on freedom of movement of the degree associated with formal arrest" that entitles a suspect to Miranda warnings." Id. at 680 (citation omitted). During an investigative stop, a defendant may be temporarily seized and not free to leave, but no Miranda warnings are necessary. Id. The instant case is far similar to the circumstances surrounding a traffic stop where the officers temporarily seize an individual at the location, to confirm or dispel and officer's suspicion of criminal activity that happened within moments of the officer's arrival, than that of officers having a search warrant, removing the defendant from

the current location, and interrogating him for over an hour regarding a happening 9-14 hours earlier.

18. As the defendant was not subjected to custodial interrogation, the defendant was not entitled to Miranda warnings, and thus the statements he made to officers should not be suppressed or excised from the search warrant application.

II. The Search Warrant Application Established Probable Cause

19. The Fourth and Fourteenth Amendments to the United States Constitution, and Part I, Article 19 of the New Hampshire Constitution mandates that search warrants be issued only upon cause or foundation supported by oath or affirmation. State v. McMinn, 144 N.H. 34, 38 (1999). These provisions require an issuing magistrate to find probable cause in order for a search warrant to be granted. Id. In order to establish probable cause, a search warrant application must show that "a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." State v. Zwicker, 151 N.H. 179, 185 (2004) (citations omitted). "[T]he affiant need only present the magistrate with sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence or contraband sought will be found in the place to be searched." Id. (citation omitted). "[C]omplete certainty has never been required [in New Hampshire] when determining whether probable cause to search exists." State v. Daniel, 142 N.H. 54, 59 (1997) (quotation and citation omitted).

20. "An affidavit may establish probable cause without the observance of contraband at the location to be searched." State v. McMinn, 144 N.H. 34, 38 (1999) (quoting State v. Silvestri, 136 N.H. 522, 527 (1992)). The application's affidavit also does not need to allege that the facts attested to were verified as long as sufficient facts were present to indicate truthfulness.

State v. Hazen, 131 N.H. 196, 201 (1988). "A determination of probable cause should be based upon 'reasonable probabilities and not the amount of evidence required to sustain a conviction or to make out a *prime facie* case . . . [and] must be viewed in the light of factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" State v. Brown, 138 N.H. 407, 409 (1994) (quoting State v. Jaroma, 137 N.H. 562, 567 (1993)).

21. The Court "assign[s] great deference to the magistrate's determination of probable cause, and do[es] not invalidate a warrant by interpreting the evidence submitted in a hyper technical sense." Zwicker, 151 N.H. at 185 (citing Cannuli, 143 N.H. at 152). "Affidavits in support of search warrants must be read, tested, and interpreted in a realistic fashion and with common sense." Silvestri, 136 N.H. at 525 (quotations and citation omitted). When evaluating the constitutionality of a warrant, "the informed and deliberate determinations of magistrates . . . are to be preferred over the hurried action of officers" acting without warrants. State v. Beaulieu, 119 N.H. 400, 403 (1979). A search based on a magistrate's determination of probable cause does not require the same standard of reliability as does a warrantless search. Id.

22. In the present case, the affidavit makes numerous relevant assertions: 1) that the defendant was found sitting in his car with his pants at his ankles, 2) that there was a vacuum hose next to him, 3) that the officers saw a nude adult female photograph in a provocative pose on the computer next to the defendant, 4) that, after giving consent to search the laptop, officers found numerous photos of naked women mixed in with what the officers characterize as child erotica involving children between the ages of 6 and 15, 5) that the defendant stated he did not personally know or was a relative of the children in the photographs, 6) the defendant admitted the he was inclined to have pictures of younger females if they were wearing panty hose or

tights, 7) that the defendant later admitted his laptop was open and displaying an image for the purpose of stimulating himself, 8) that the defendant admitted to approximately 500 images he described as pornography, 9) that the defendant acknowledged searching the internet for pornography and he sometimes gets images of children when he searches for his fetishes including pantyhose, legs, and/or feet, 10) that this behavior and activity is common among individuals who possess or have access to view child pornography, 11) that the defendant has a history of being caught doing the same activity. It is abundantly clear that the defendant was using images on his laptop for sexual arousal. By his own admission, some of those images were pornographic and some of those images were of children. It was entirely justifiable for Judge Michael to believe that there was a substantial likelihood that what was sought – evidence of child sexual abuse images – might be found through the search. He need not have been certain, but considering the combination of the defendant using pornographic images for sexual purposes and his admission that there were images of children related to his fetishes, there was certainly probable cause to grant the search.

23. The Defendant misconstrues a number of cases to support his argument. For example, U.S. v. Brunette, 256 F.3d 14 (1st Cir. 2001), certainly does not establish any requirement that probable cause be found for "a given image." Def.'s Motion ¶ 47. In Brunette the sole basis for the warrant was images from an internet account associated with the defendant. There was no additional information about the defendant or the activities in which he was engaged as is the case here. Similarly, State v. Dowman, 151 N.H. 162 (2004), does not "make clear that there are three ways in which probable cause can be found." Def.'s Motion ¶ 49. In fact, the Court affirms that probable cause for a search warrant involving an investigation into child sexual abuse images should be evaluated under the "same standard of probable cause used

to review warrant applications generally." Dowman, 151 N.H. at 164. Such an evaluation naturally considers the totality of the evidence presented in a realistic, common-sense manner. See Silvestri, 136 N.H. at 525. The clear takeaway from Dowman is that statements of a defendant should be considered in finding probable cause and the magistrate is not required to view the images. Dowman, 151 N.H. at 165-66.

24. The defense motion further fails in its reliance on the argument that images of children were not adequately described. Clearly that kind of analysis and level of detail might be appropriate where the images are the only source of information to support probable cause as in Brunette, but there is no question here that the affiant was not relying on the discovery of actual child sexual abuse images to justify a further search for child sexual abuse images. As described above, the reasonableness of the search is predicated on catching the defendant using images on his computer for sexual purposes, his admission that many of the images were pornographic, his admission that there were images of children, the fact that even in the officer's cursory review the images of children and the obviously pornographic images were intermixed, his admission that when he searches for his "fetishes" he finds images of children, the training and experience of the officers, and common sense.

CONCLUSION

25. The defendant was not subjected to custodial interrogation at the time he made statements at the scene, and therefore Miranda did not apply. Additionally, the search warrant that was properly granted because the supporting affidavit in the application for the warrant had sufficient facts for the finding of probable cause. The supporting affidavit had information from which the Judge could make a sufficient determination of the veracity of the facts, and that there was ample information to support a finding that one could reasonably believe that evidence

would be found in the places to be searched. Therefore, none of the evidence should be suppressed at trial.

WHEREFORE, the State respectfully requests that this Honorable Court:

A) DENY the Defendant's Motion to Suppress;

B) Schedule a hearing on the matter if deemed necessary; and/or

C) Grant such other and further relief as may be just and proper.

DATED:

Respectfully submitted,

Michael Valentine – Bar ID # 16506
Assistant County Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Objection has been forwarded on this day to Gregory M. Albert, Esq., counsel for the defendant.

Michael Valentine

2015 WL 11181927
Only the Westlaw citation is currently available.
Supreme Court of New Hampshire.

State of New Hampshire
v.
Ronald Beausoleil

Case No. 2014-0082
|
March 9, 2015

Opinion

*1 The defendant, Ronald Beausoleil, appeals his convictions, following a jury trial in Superior Court (Delker, J.), on charges of aggravated felonious sexual assault and felonious sexual assault. See RSA 632-A:2 (2007) (amended 2008, 2012, and 2014), :3 (2007) (amended 2008, 2010, and 2014). He argues that the trial court erred by not suppressing, under the State and Federal Constitutions: (1) the victim's out-of-court and in-court identifications of him; and (2) statements he made prior to receiving Miranda warnings, see Miranda v. Arizona, 384 U.S. 436 (1966). We affirm.

We address the defendant's arguments first under the State Constitution and rely on federal law only to aid in our analysis. State v. Ball, 124 N.H. 226, 231-33 (1983). The defendant first argues that the trial court erred by not suppressing identification testimony. We will not overturn the trial court's ruling on a motion to suppress identification testimony unless it is contrary to the weight of the evidence. State v. Perri, 164 N.H. 400, 404 (2013). We ask whether the identification procedure used by the police was so unnecessarily suggestive and conducive to irreparable misidentification that it denied the defendant due process. Id. It is the defendant's burden to establish that an identification procedure was unnecessarily suggestive. Id. Once the defendant satisfies this burden, the State must demonstrate, by clear and convincing evidence, that pursuant to the factors enumerated in Neil v. Biggers, 409 U.S. 188 (1972), the procedure was not so suggestive as to have rendered the identification unreliable. Perri, 164 N.H. at 404; State v. Whittey, 134 N.H. 310, 312 (1991).

The evidence at trial establishes that the defendant, whom the victim did not know, committed the charged sexual assaults while the victim, a nine-year-old child, was alone in the toy aisle of a department store. Shortly after the assaults, a Plaistow detective reviewed footage from the store's surveillance video, identified a suspect, and took still photographs of the suspect from the video. Within two hours of the assaults, the detective showed one of the photographs to the victim, who stated that the person depicted in the photograph "look[ed] like" the person who had committed the assaults. On the following day, after the Plaistow police had issued a "be-on-the-lookout" (BOLO) notice containing photographs of the suspect and a vehicle he had entered, a Massachusetts detective identified the person depicted in the photographs as the defendant.

Although the defendant did not dispute at trial that the photographs were of him, he moved to suppress testimony concerning the victim's identification on the basis that showing the victim a single photograph amounted to a one-person show-up. We have observed that a one-person show-up is inherently suggestive. See State v. Leclair, 118 N.H. 214, 219 (1978); State v. Butler, 117 N.H. 888, 891 (1977). We have also recognized, however, that such a procedure may be justified by exigent circumstances. See Leclair, 118 N.H. 219. In denying the motion, the trial court reasoned, alternatively, that: (1) showing the victim an image of an unknown suspect from surveillance video of a crime scene was not an "identification procedure"; (2) exigent circumstances justified the procedure; and (3) the identification was reliable under Biggers. Assuming, without deciding, that showing the photograph constituted an identification procedure, and that there were no exigent circumstances, we conclude that the trial court reasonably could have found that the identification was reliable.

*2 The factors that the trial court must consider in evaluating the reliability of an identification include: (1) the witness's opportunity to view the suspect; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the witness's degree of certainty at the time of the identification; and (5) the lapse of time between the crime and the identification. Perri, 164 N.H. at 404; see Biggers, 409 U.S. at 199-200. In applying these factors, the trial court found that: (1) the four minutes that the victim and the assailant were together provided the victim with a sufficient opportunity to view him; (2) the assailant engaged the victim in conversation during their encounter;

(3) the victim's description of the assailant was accurate and consistent with the suspect's appearance; (4) the victim did not equivocate in stating that the suspect "look[ed] like" the assailant; and (5) only a few hours had elapsed between the assaults and the identification. These findings are supported by the record, and in turn support the trial court's determination that the identification was reliable. Upon this record, we cannot say that the trial court's conclusion that the identification was reliable was contrary to the weight of the evidence. Perri, 164 N.H. at 404. Because the Federal Constitution is no more protective of the defendant's rights than is the State Constitution under these circumstances, see Biggers, 409 U.S. at 199-201, we reach the same result under the Federal Constitution.

We next address whether the trial court erred by not suppressing statements the defendant made prior to receiving Miranda warnings. The defendant argues that, although he had not yet been formally arrested when he made the statements, he was in "custody" for purposes of Miranda. Custody, which triggers a defendant's right to Miranda warnings, requires either a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. State v. McKenna, 166 N.H. ——, ——, 103 A.3d 756, 761 (2014). Absent a formal arrest, we determine whether the defendant's freedom of movement was sufficiently curtailed so as to amount to custody by considering how a reasonable person in the defendant's position would have understood the situation. Id. In evaluating whether a reasonable person would believe himself to be in custody, the trial court should consider the totality of the circumstances, including, but not limited to, the number of officers present, the degree to which the defendant was physically restrained, the interview's duration and character, and the defendant's familiarity with his surroundings. Id. at ——, 103 A.3d at 762. Although we will not overturn the trial court's factual findings regarding what transpired unless they are contrary to the manifest weight of the evidence, we review its ultimate determination of custody de novo. Id.

The record establishes that at approximately 6:00 p.m. on the day following the assaults, a deputy sheriff observed a vehicle, which matched the description of the vehicle contained within the BOLO, in a fire lane of the same parking lot that services the store where the assaults had occurred. After activating his blue lights and initiating a traffic stop, the deputy approached the driver, who was the defendant, told him that he had pulled him over because he was in a fire lane and because his vehicle matched the description of a vehicle that was the subject of an investigation, and requested assistance from the Plaistow Police Department. The deputy's interaction with the defendant lasted approximately one minute. Approximately ten minutes after initiating the stop, a Plaistow police officer arrived, spoke briefly with the defendant, and then contacted detectives. At some point during the stop, a woman joined the defendant in the vehicle.

A responding detective, who was in plain clothes, arrived to find two Plaistow police cruisers and a sheriff's vehicle parked with the defendant's vehicle in the parking lot. One of the officers told the detective that the defendant's vehicle matched the description of the vehicle from the BOLO, and that while he thought that the defendant was the person suspected of assaulting the victim, he was uncertain. The detective then approached the defendant, identified himself as a Plaistow detective, and asked if he would get out of the vehicle and speak with him. The defendant agreed, and asked what was going on. The detective and defendant walked approximately ten to fifteen feet from the vehicle and approximately five or six feet away from where the other officers were, and the detective explained that he was investigating an incident that had occurred the evening before at the department store. The detective asked whether the defendant had been at that store on the previous evening, and he stated that he had not been there. The detective then asked the defendant to stay there while he spoke with the female passenger.

*3 At no point during this encounter, which lasted seven or eight minutes, did the detective physically place his hands on the defendant, escort him, or place him in handcuffs. Nor did the detective, or any of the other officers, raise his voice or draw a weapon; indeed, the detective was unarmed. After the female passenger confirmed that the defendant had, in fact, been with her in the department store on the prior evening, the detective arrested the defendant and read him his Miranda rights.

In arguing that he was in custody prior to his formal arrest, the defendant relies heavily upon McKenna. In McKenna, the defendant underwent more than an hour of interrogation by police officers who had traveled more than three hours ostensibly to speak with him about a "private" matter, but who acknowledged that they

were really attempting to "extract a confession" from the defendant. See McKenna, 166 N.H. at ——, 103 A.3d at 765. The officers in McKenna had already secured an arrest warrant, and were planning on serving it. See id. at ——, 103 A.3d at 759. In this case, by contrast, the record establishes that the defendant was the subject of a brief investigatory stop at the time of the interrogation. A defendant is not in custody merely because his freedom of movement has been curtailed pursuant to an investigatory stop. See State v. Turmel, 150 N.H. 377, 383 (2003). While the subject of the stop may be "seized" for purposes of Part I, Article 19, the seizure does not constitute "custody" for purposes of Miranda so long as the detention does not exceed the scope of a lawful investigatory stop. See id.

Nothing in this record establishes that the detention exceeded the scope of a lawful investigatory stop. To the contrary, the deputy sheriff explained to the defendant from the outset that he was being detained because the vehicle he was driving matched the description of a vehicle that was involved in an ongoing investigation, and the detective's limited questions were aimed at confirming or dispelling the suspicion that the defendant was the person suspected of sexually assaulting the victim at that same location on the prior evening. Compare McKenna, 166 N.H. at ——, 103 A.3d at 765 (noting that unlike Turmel, the officers' purpose was to extract a confession), with Turmel, 150 N.H. at 383 (noting that the officers' purpose was to confirm or dispel their suspicion that the defendant possessed marijuana). The detention itself was not unduly lengthy and was in a public place with which the defendant had some familiarity, and at no point during the detention did any officer restrain the defendant or brandish a weapon. See Turmel, 150 N.H. at 384-85. Although three or four officers were on hand, only the detective questioned the defendant, and did so, according to the trial court, "out of ear shot of the other officers." See id. (noting that although there were four officers present, only two questioned the defendant and were in his immediate vicinity). Once the detective's suspicion was confirmed, he formally arrested the defendant and Mirandized him. While the defendant could reasonably have understood that he was not free to leave during the detention, upon this record we conclude that he could not reasonably have believed that he was under the functional equivalent of an arrest. See id. at 385.

Because we conclude that the challenged statements occurred within the scope of a lawful investigatory stop, the trial court did not err by denying the motion to suppress. See id. Because the Federal Constitution is no more protective of the defendant's rights under these circumstances than is the State Constitution, see Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984), we reach the same result under the Federal Constitution.

*4 Affirmed.

HICKS, CONBOY, and BASSETT, JJ., concurred.

All Citations

Not Reported in A.3d, 2015 WL 11181927

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT

HILLSBOROUGH, SS. March Term, 2017

STATE OF NEW HAMPSHIRE

v.

ROBERT NORMAN
#216-16-787

MOTION TO RECONSIDER

NOW COMES the defendant, Robert Norman, by and through counsel, Gregory M. Albert and Kyle Robidas, and respectfully requests this Honorable Court to reconsider its order denying the defendant's motion to suppress all evidence from a search of Mr. Norman's computer and hard drive. This motion to reconsider is based on Mr. Norman's rights under Part 1, Articles 15 and 19 of the New Hampshire Constitution, and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. In support of this motion, the following is stated:

FACTS

1. The court held a hearing on the defendant's motion to suppress both his statements and the search of his computer and hard drive. After a hearing, the court denied the defendant's motion to suppress on both grounds.
2. The defendant promptly filed a motion for interlocutory appeal with the New Hampshire Supreme Court. The Supreme Court declined to hear the interlocutory appeal and sent the case back to the Superior Court.
3. A status conference is scheduled for March 13, 2017 at 9:00 am to determine the scheduling for the upcoming trial.

after Review, Motion
Denied
3/22/17

ARGUMENT

4. In the court's order on the motion to suppress, the court reasoned that as the New Hampshire Constitution "provides at least as much protection in these areas as the United States Constitution, the Court addresses the defendant's claims under the State Constitution, citing to federal authority for guidance only." See Order, p. 6; State v. Bell, 164 N.H. 452, 455 (2012); State v. Ball, 124 N.H. 226, 231-33 (1983).

5. Norman filed his motion noting both his protection under the federal and state constitutions. As noted in United States v. Brunette, 256 F.3d 14 (1st Cir. 2001) and United States v. Roberts, 274 F.3d 1007 (5th Cir. 2001), the federal courts have differed with state court in taking a stricter approach for search warrants in these cases.

6. The state and federal statutes are substantially similar for child sex abuse images. The federal statute prohibits, inter alia, "lascivious exhibition of the genitals or pubic area of any [minor] person." See 18 U.S.C. § 2256(8) (defining child pornography) (emphasis added). This subsection of the federal statute is similar in wording to the child pornography statute in the State of New Hampshire, RSA 649-A:2(III) (prohibiting, inter alia, "lewd exhibitions of the buttocks [or] genitals") (emphasis added).

7. The 1st Circuit uses a so-called "attach-or-describe" rule from Brunette. See United States v. Burdulis, 2011 U.S. Dist. LEXIS 53612, at 44 (2011); see also United States v. Syphers, 426 F.3d 461, 466-67 (2005) (finding probable cause on the "good faith" exception allowable in federal court but not in state court when the government did not argue probable cause for the warrant absent a sufficient description of the images or attachments thereof).

8. The United States Constitution is more protective than the New Hampshire Constitution in this case, and it therefore should be used as more than mere guidance; it should be followed as mandatory authority since Bell and Ball do not apply.
9. Under the 1st Circuit attach-or-describe rule, the search of Norman's computer would be suppressed. Therefore, the New Hampshire Constitution is not as protective as the United States Constitution in this matter.
10. Given that analysis, the court should reconsider its ruling based on the more protective federal constitution, and now suppress the evidence of the search of Norman's computer and his hard drive.

WHEREFORE Robert Norman, by and through counsel, respectfully requests this Honorable Court:

a) Reconsider its denial of the defendant's motion to suppress and now suppress the search of his computer and hard drive, and

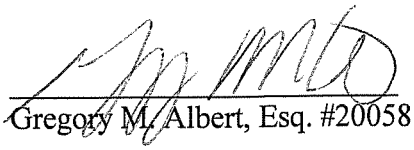
b) For any other such relief as the Court deems in the interest of justice.

Respectfully submitted,

Gregory M. Albert, Esq. #20058
New Hampshire Public Defender
20 Merrimack Street
Manchester, NH 03101
(603) 669-7888

CERTIFICATE OF SERVICE

I, Gregory M. Albert, hereby certify that a copy of the foregoing Motion has been forwarded this 2nd day of March, 2017 to ACA Michael Valentine.



Gregory M. Albert, Esq. #20058

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 216-2016-CR-00787

SUPERIOR COURT
NORTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

ROBERT NORMAN

STATE'S OBJECTION TO DEFENDANT'S MOTION TO RECONSIDER

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and objects to the defendant's Motion to Reconsider, stating as follows:

1. The defendant, Robert Norman, is charged with eight counts of Possession of Child Sexual Abuse Images, and one count of Indecent Exposure and Lewdness. The defendant previously moved to suppress evidence obtained as a result of a search warrant. After a hearing, the Court denied that motion. The defendant now asks the Court to reconsider. The State objects.

2. A "motion [for reconsideration] shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present." Super. Ct. R. 43. In the present case, the defendant suggests the Court erred in finding the State Constitution at least as protective as the Federal Constitution and not following his interpretation of United States v. Brunette, 256 F.3d 14 (1st Cir. 2001). While the Court did note that the State Constitution was at least as protective in the areas of search seizure as the Federal Constitution, the Court went to on to analyze the issue with both State and Federal cases.

3. Most importantly, the defendant's argument on the motion to reconsider rests solely on his proposition, expressly rejected by the Court, that the holding of Brunette *requires* an application for a search warrant seeking to investigate child sexual abuse images to include

either an attachment with child sexual abuse images or clear descriptions of child sexual abuse images. In Brunette the magistrate was presented with an affidavit that apparently contained only an agent's assertion that the suspect images "depicted 'a prepubescent boy lasciviously displaying his genitals.'" Id. at 17. Noting such language was an attempt to "mirror" the Federal child pornography statute, the Court described the statement as a "bare legal assertion." Id. Brunette does not establish that the lack of such attachments or descriptions renders a search warrant affidavit insufficient to find probable cause. Indeed, Brunette does not even begin to consider other factual scenarios where there is evidence to support an application for a warrant. See, e.g., United States v. Roberts, 274 F.3d 1007 (5th Cir. 2001); State v. Dowman 151 N.H. 162 (2004).

4. Brunette is not analogous to the case before this Court as the State conceded that the police did not ever view a specific image of child sexual abuse that could have been attached to a warrant or particularly described. There remains no State or Federal case, however, which *requires* the police to have actually viewed a CSAI image in order to establish probable cause that a suspect possesses CSAI. As the Court has already ruled, both the State and Federal cases hold that the determination of whether probable cause exists is determined from the same test as any other case. Ct. Order re: Motion to Suppress p. 9-10. Under State law, "[p]robable cause is established where a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." State v. Dowman, 151 N.H. 162, 164 (2004). Such a determination is made by a "totality-of-the-circumstances." State v. Letoile, 166 N.H. 269, 273 (2014). Under Federal law, the Court should "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit[,] ... there is a fair probability that contraband or evidence of a crime will be found in a

particular place. This assessment is no different where First Amendment concerns may be at issue." Brunette, 256 F.3d at 16 (citations and quotations omitted).

5. Even if the Court does determine that Federal law is more protective than the defendant with respect to the question of probable cause, the evidence should still not be excluded because suppression under the Federal Constitution is subject to a "good faith" analysis. United States v. Leon, 468 U.S. 897, 922 (1984). In Leon the Court held that excluding evidence was not an appropriate remedy in cases where there was no meaningful law enforcement misconduct to deter. See id. "We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." Id. Indeed, though the Court in Brunette decided the warrant at issue lacked probable cause, the evidence was not suppressed. "Th[e] exclusionary rule does not [apply], however, where an objectively reasonable law enforcement officer relied in good faith on a defective warrant because suppression in that instance would serve no deterrent purpose." Brunette, 256 F.3d at 19. "Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." Leon, 468 U.S. at 922 (citations, quotations and alterations omitted). Suppression is still appropriate where the magistrate was misled, the magistrate "wholly abandoned his judicial role" such that "no reasonably well-trained officer should rely on the warrant," the affidavit was so lacking in any "indicia of probable cause,' or where it is facially deficient such as failing to identify the thing or place to be seized or searched. Id.

6. In the instant case, the application for the search warrant contained no misinformation or omissions. As the request for the warrant was not based on a specific image of

CSAI, it cannot even reasonably be argued that the officer failed to include information that he should have known was required for a finding of probable cause. The officer did exactly what is expected of a reasonable police officer, he detailed in an affidavit the information his investigation had produced and submitted it to a neutral and detached magistrate for a decision on whether there was probable cause to engage in a further search of the computer. While the defense argues that the law is clear the evidence should be suppressed, he cites cases that are clearly distinguishable from the facts of this and it is certainly not clearly settled that the totality of evidence in the current case is not sufficient to establish probable cause. Indeed, the Court's analysis in the order the defendant is currently asking the Court to reconsider demonstrates at the least that the officer himself would not have known the affidavit was insufficient and thus the warrant was defective. Penalizing the State and rewarding the defendant by excluding the evidence serves no deterrent purpose because there was no misconduct to deter.

7. The warrant authorized in this case was valid under the State Constitution and the Federal Constitution. Moreover, to the extent the defendant asks the Court to rule specifically on his Federal claim, the evidence would not be excluded even if the warrant was defective because the officer relied in good faith on a validly-issued warrant. Thus, under no circumstance should the evidence be suppressed.

WHEREFORE, the State respectfully requests that this Honorable Court:

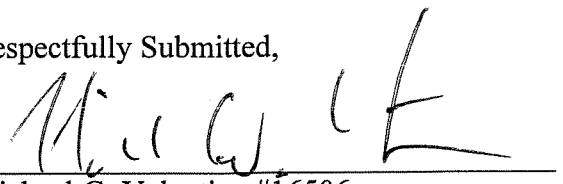
A. Deny the Defendant's Motion to Reconsider;

B. Schedule a hearing thereon, if necessary; and

C. Grant the State any such other relief as may be proper and just.

DATED: March 17, 2017

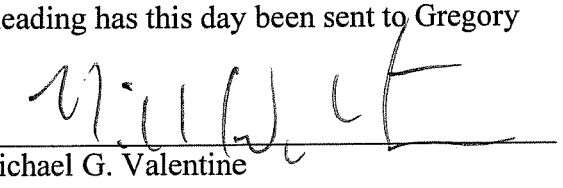
Respectfully Submitted,



Michael G. Valentine #16506
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Gregory M. Albert, Esq., counsel for the defendant.



Michael G. Valentine

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Hillsborough County Superior Court - Northern District**

Case Name: **State v. Robert Norman**

Case Number: **216-2016-CR-00787** Charge ID Number: **1240142C**

(if known)

STATE PRISON SENTENCE

Plea/Verdict: **GUILTY**	Clerk: JLC
Crime: **Possession Of Child Sexual Abuse Images**	Date of Crime: **02/16/16**
Monitor: AT	Judge: Brown

A finding of **GUILTY/TRUE** is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than 8 year(s), nor less than 4 year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☒ 2. This sentence is to be served as follows: ☒ Stand committed ☒ Commencing **Forthwith**.

☐ 3. _____ of the minimum sentence is suspended and _____ of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends _____ years from ☐ today **or** ☐ release on charge ID: _____.

☐ 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☒ 5. 1 year of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☐ 6. The sentence is: ☐ consecutive to charge ID(s) _____.
☐ concurrent with charge ID(s) _____.

☒ 7. Pretrial confinement credit: 271 days.

☒ 8. The Court recommends to the Department of Corrections:
- ☐ Drug and alcohol treatment and counseling
- ☒ Sexual offender program
- ☐ Sentence to be served at the House of Corrections
- ☐ Other: _____

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☒ 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____.
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10% service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for _____ years(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☐ B. The defendant is ordered to make restitution of $ _____ to: _____.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____.

☒ C. The defendant is to meaningfully participate in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the:
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service with a registered charity and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

☒ I. The defendant and the State have waived sentence review in writing or on the record.

☒ J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other:

5/16/17
Date

K E Bacon
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Hillsborough County Superior Court - Northern District**

Case Name: **State v. Robert Norman**

Case Number: **216-2016-CR-00787** Charge ID Number: **1240143C**

(if known)

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☒ 2. This sentence is to be served as follows: ☒ Stand committed ☒ Commencing **Forthwith**.

☐ 3. _____ of the minimum sentence is suspended and _____ of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends _____ years from ☐ today **or** ☐ release on charge ID: _____.

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☒ concurrent with charge ID(s) **1240142C**.

☒ 7. Pretrial confinement credit: 271 days.

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☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☒ 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____.
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10% service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for _____ years(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☐ B. The defendant is ordered to make restitution of $ _____ to: _____.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____.

☒ C. The defendant is to meaningfully participate in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the:
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service with a registered charity and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

☒ I. The defendant and the State have waived sentence review in writing or on the record.

☒ J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other:

8/16/17
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Hillsborough County Superior Court - Northern District**

Case Name: **State v. Robert Norman**

Case Number: **216-2016-CR-00787** Charge ID Number: **1240145C**

(if known)

STATE PRISON SENTENCE

Plea/Verdict: **GUILTY**	Clerk: JLC
Crime: **Possession Of Child Sexual Abuse Images**	Date of Crime: **02/16/16**
Monitor: LT	Judge: Brown

A finding of **GUILTY/TRUE** is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than **8** year(s), nor less than **4** year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☒ 2. This sentence is to be served as follows: ☒ Stand committed ☒ Commencing **Forthwith**.

☐ 3. _____ of the minimum sentence is suspended and _____ of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends _____ years from ☐ today **or** ☐ release on charge ID: _____.

☐ 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☒ 5. 1/4 of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☒ 6. The sentence is: ☐ consecutive to charge ID(s) _____.
☒ concurrent with charge ID(s) **1240142C**.

☒ 7. Pretrial confinement credit: 271 days.

☒ 8. The Court recommends to the Department of Corrections:
- ☐ Drug and alcohol treatment and counseling
- ☒ Sexual offender program
- ☐ Sentence to be served at the House of Corrections
- ☐ Other: _____.

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☒ 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____.
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10% service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for _____ years(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☐ B. The defendant is ordered to make restitution of $ _____ to: _____.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____.

☒ C. The defendant is to meaningfully participate in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the:
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service with a registered charity and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

☒ I. The defendant and the State have waived sentence review in writing or on the record.

☒ J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other:

5/14/17
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Hillsborough County Superior Court - Northern District**

Case Name: **State v. Robert Norman**

Case Number: **216-2016-CR-00787** Charge ID Number: **1240146C**

(if known)

STATE PRISON SENTENCE

Plea/Verdict: **GUILTY**	Clerk: JLC
Crime: **Possession Of Child Sexual Abuse Images**	Date of Crime: **02/16/16**
Monitor: LT	Judge: Brown

A finding of **GUILTY/TRUE** is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than **8** year(s), nor less than **4** year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☒ 2. This sentence is to be served as follows: ☒ Stand committed ☒ Commencing **Forthwith**.

☐ 3. _____ of the minimum sentence is suspended and _____ of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends _____ years from ☐ today **or** ☐ release on charge ID: _____.

☐ 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☒ 5. 1 year of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☒ 6. The sentence is: ☐ consecutive to charge ID(s) _____.
☒ concurrent with charge ID(s) **1240142C**.

☒ 7. Pretrial confinement credit: 271 days.

☒ 8. The Court recommends to the Department of Corrections:
- ☐ Drug and alcohol treatment and counseling
- ☒ Sexual offender program
- ☐ Sentence to be served at the House of Corrections
- ☐ Other: _____.

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☒ 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____.
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10% service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for _____ years(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☐ B. The defendant is ordered to make restitution of $ _____ to: _____.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____.

☒ C. The defendant is to meaningfully participate in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the:
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service with a registered charity and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

☒ I. The defendant and the State have waived sentence review in writing or on the record.

☒ J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other:

5/14/17
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Hillsborough County Superior Court - Northern District**

Case Name: **State v. Robert Norman**

Case Number: **216-2016-CR-00787** Charge ID Number: **1240147C**

(if known)

STATE PRISON SENTENCE

Plea/Verdict: **GUILTY**	Clerk: JLC
Crime: **Possession Of Child Sexual Abuse Images**	Date of Crime: **02/16/16**
Monitor: LT	Judge: Brown

A finding of **GUILTY/TRUE** is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than **10** year(s), nor less than **5** year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☐ 2. This sentence is to be served as follows: ☐ Stand committed ☐ Commencing _____.

☒ 3. **All** of the minimum sentence is suspended and **all** of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends **10** years from ☐ today **or** ☒ release on charge ID: **1240142C**.

☐ 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☐ 5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☒ 6. The sentence is: ☒ consecutive to charge ID(s) **1240142C**.
☐ concurrent with charge ID(s) _____.

☐ 7. Pretrial confinement credit: _____ days.

☐ 8. The Court recommends to the Department of Corrections:
- ☐ Drug and alcohol treatment and counseling
- ☐ Sexual offender program
- ☐ Sentence to be served at the House of Corrections
- ☐ Other: _____.

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☒ 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____.
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10% service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for _____ years(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☐ B. The defendant is ordered to make restitution of $ _____ to: _____.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____.

☒ C. The defendant is to meaningfully participate in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the:
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service with a registered charity and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

☒ I. The defendant and the State have waived sentence review in writing or on the record.

☒ J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other:

5/16/17
Date

KC Brown
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Hillsborough County Superior Court - Northern District**

Case Name: **State v. Robert Norman**

Case Number: **216-2016-CR-00787** Charge ID Number: **1240148C**

(if known)

STATE PRISON SENTENCE

Plea/Verdict: **GUILTY**	Clerk: JLC
Crime: **Possession Of Child Sexual Abuse Images**	Date of Crime: **02/16/16**
Monitor: LT	Judge: Brown

A finding of **GUILTY/TRUE** is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than **10** year(s), nor less than **5** year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☐ 2. This sentence is to be served as follows: ☐ Stand committed ☐ Commencing _____.

☒ 3. **All** of the minimum sentence is suspended and **all** of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends **10** years from ☐ today **or** ☒ release on charge ID: **1240142C**.

☐ 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☐ 5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☒ 6. The sentence is: ☒ consecutive to charge ID(s) **1240142C**.
☒ concurrent with charge ID(s) **1240147C**.

☐ 7. Pretrial confinement credit. _____ days.

☐ 8. The Court recommends to the Department of Corrections:
- ☐ Drug and alcohol treatment and counseling
- ☐ Sexual offender program
- ☐ Sentence to be served at the House of Corrections
- ☐ Other: _____.

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☒ 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____.
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10% service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for _____ years(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☐ B. The defendant is ordered to make restitution of $ _____ to: _____.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____.

☒ C. The defendant is to meaningfully participate in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the:
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service with a registered charity and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

☒ I. The defendant and the State have waived sentence review in writing or on the record.

☒ J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other:

5/16/17
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Hillsborough County Superior Court - Northern District**

Case Name: **State v. Robert Norman**

Case Number: **216-2016-CR-00787** Charge ID Number: **1240149C**

(if known)

STATE PRISON SENTENCE

Plea/Verdict: **GUILTY**	Clerk: JLC
Crime: **Possession Of Child Sexual Abuse Images**	Date of Crime: **02/16/16**
Monitor: LT	Judge: Brown

A finding of **GUILTY/TRUE** is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than **10** year(s), nor less than **5** year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☐ 2. This sentence is to be served as follows: ☐ Stand committed ☐ Commencing _____.

☒ 3. **All** of the minimum sentence is suspended and **all** of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends **10** years from ☐ today **or** ☒ release on charge ID: **1240142C**.

☐ 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☐ 5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☒ 6. The sentence is: ☒ consecutive to charge ID(s) **1240142C**.
☒ concurrent with charge ID(s) **1240147C**.

☐ 7. Pretrial confinement credit: _____ days.

☐ 8. The Court recommends to the Department of Corrections:
- ☐ Drug and alcohol treatment and counseling
- ☐ Sexual offender program
- ☐ Sentence to be served at the House of Corrections
- ☐ Other: _____.

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Case Name: State v. Robert Norman
Case Number: 216-2016-CR-00787 (1240149C)
STATE PRISON SENTENCE

PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☒ 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____.
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10% service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for _____ years(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☐ B. The defendant is ordered to make restitution of $ _____ to: _____.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____.

☒ C. The defendant is to meaningfully participate in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the:
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service with a registered charity and provide proof to ☐ the State or ☐ probation within _____ of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

☒ I. The defendant and the State have waived sentence review in writing or on the record.

☒ J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other:

5/16/17
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0280

The State Of New Hampshire

v.

Robert Norman

APPEAL PURSUANT TO MANDATORY APPEAL (RULE 7) FROM A JUDGMENT OF THE HILLSBOROUGH/NORTH SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald
Attorney General

Katherine A. Triffon
N.H. Bar ID No. 268833
Attorney
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

(5 minutes, 3JX)

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ISSUES PRESENTED

I. Whether the affidavit for the warrant established probable cause where the affidavit described the defendant's prior criminal history, the circumstances surrounding his underlying arrest, a description of the photos discovered on the defendant's computer at the time of his arrest, and the affiant's training and experience as a law enforcement officer, specifically in the area of child pornography.

II. Whether the seized photographs which depicted prepubescent, naked females in a variety of poses and backgrounds, constituted child sexual abuse images.

STATEMENT OF THE CASE

On February 19, 2016, the State obtained a search warrant for the defendant's (Robert Norman) Sony laptop, Motorola cell phone, and Seagate external hard drive. DBA: 40–54.[1] On June 15, 2016, a Hillsborough County grand jury indicted the defendant on eight counts of possession of child sexual abuse images ("CSAI") in violation of RSA 649-A:3, I(a) (2016). DBA: 15–22. The defendant filed a motion to suppress the evidence obtained during the search warrant, DBA: 23–37, which the State opposed, DBA: 55–66, and which the trial court denied on January 6, 2017, DBA:1–13.

Following a stipulated-facts bench trial, the defendant was found guilty of six counts of CSAI, T: 26, and sentenced to a stand committed term of four to eight years with one year of the minimum sentence suspended if the defendant were to complete a sex offender program, DBA: 79–86, and a suspended sentence of five to ten years to run consecutive to the stand-committed sentence, DBA: 87–92. This appeal followed.

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[1] "DB:__" refers to the defendant's brief and page number.
"DBA:__" refers to the appendix to the defendant's brief and page number.
"M:__" refers to the transcript of the motion to suppress and page number.
"T:___" refers to the transcript of the stipulated-facts trial and page number.

STATEMENT OF FACTS

A. Factual Background

On February 16, 2016, police officers from the Hillsborough Police Department ("HPD"), responded to the Walmart parking lot in Amherst for an incident unrelated to the defendant. T: 11. While they were there, they observed a pickup truck with wires running from underneath the hood into the cab of the vehicle and the defendant, who appeared to be slumped over the steering wheel, *Id.*

Upon approaching the vehicle, they found the defendant with his pants around his feet, his penis exposed, and a vacuum hose propped up on his leg, *Id.* The police also saw a laptop computer open on the front passenger seat with an image of a partially nude female on the screen, T: 11–12. There was also a cell phone and a hard drive on the front passenger's seat.

The officers asked the defendant to step out of the truck and pull his pants up, which he did. T:12. They also asked for consent to search his laptop, which he gave. T: 12. The police found multiple images on the laptop of a sexual nature, including several of children, estimated to be between the ages of 6 and 15. There were young children in dresses and teenagers in cheerleading outfits. *Id.* When asked about those images, the defendant said they were not pictures of family

members and that he liked photos of younger females if they were wearing pantyhose. *Id.* The defendant subsequently admitted to using those images to "stimulate" himself, and that he had "not yet" begun masturbating in the Walmart parking lot when the police discovered him. T: 13. The defendant also admitted that his laptop contained approximately 500 pornographic images and that he used public access Wi-Fi to download such images so that they would not be traced back to him. *Id.*

The defendant was specifically asked about the images of the children and he said that those images would sometimes appear when he searched for his fetishes. *Id.*

The defendant was placed under arrest for indecent exposure, M:17 and the police obtained a search warrant to search for child sexual abuse images on the defendant's phone, hard drive, and laptop. During execution of the warrant,the police discovered eight images of nude, prepubescent females on the defendant's laptop. T: 14.

B. Motion Hearing

The trial court held a hearing on the defendant's Motion to Suppress on December 21, 2016.

The State presented evidence that the defendant consented to a search of his computer where images of young girls were discovered, and that he admitted to using those images for sexual gratification and that those images were described in the affidavit. M:57.

The State went on to describe a prior incident where the defendant was arrested for indecent exposure wherein the facts almost exactly mirrored the underlying facts of the defendant's present case. *Id.*

The State pointed out that the search warrant affidavit included all of this information, as well as the affiant's training and experience with regards to law enforcement and specifically to experience with computers and child pornography. *Id.*

The defense argued that the description of the images discovered on the defendant's computer and contained in the affidavit were not sufficient, and in lieu of a more precise description, the affiant should have included copies of the images in the warrant application for the magistrate to review. M:61.

The defense conceded that the affiant did not misrepresent the images, but argued that his representation was conclusory and therefore should not go to the weight of probable cause. M:62.

The defense also argued that the facts surrounding the defendant's arrest (caught in a parking lot with his genitals exposed) and his prior arrest for the same offense did not rise to the level of probable cause. M: 64–65.

The trial court took the matter under advisement and issued a written opinion wherein the court used a "totality-of-the-circumstances" analysis. The court considered the facts surrounding the defendant's arrest, the images found on the defendant's laptop at the scene of his arrest, and the training and experience of the affiant, Officer Smith to conclude that the warrant and affidavit established probable cause. DBA: 10–14.

SUMMARY OF THE ARGUMENT

I. The trial court committed no error in concluding that the search warrant affidavit established probable cause to search the defendant's laptop, hard drive, and cell phone for evidence of child pornography. The images of child erotica viewed on the defendant's open laptop at the time of his arrest, the circumstances surrounding his arrest, his criminal history, and the defendant's own statements to the police, are all part of the totality-of-the-circumstances. Those circumstances demonstrated probable cause that the defendant's laptop, hard drive, and cell phone would contain CSAI.

II. This Court must affirm the defendant's convictions stemming from the indictments supported by seven of the images because those images are CSAI.

ARGUMENT

I. THE SEARCH WARRANT WAS PROPERLY BASED ON PROBABLE CAUSE DEMONSTRATED BY THE AFFIDAVIT.

The defendant first argues that the affidavit underlying the search warrant failed to establish probable cause that the defendant possessed CSAI. DB: 9–27. On appeal, this Court reviews "the trial court's order *de novo* except with respect to any controlling factual findings." *State v. Ward*, 163 N.H. 156, 160 (2012) (citing *State v. Dalling*, 159 N.H. 183, 185 (2009)). Nevertheless, this Court "afford[s] much deference to a magistrate's determination of probable cause and will not invalidate warrants by reading the supporting affidavit in a hypertechnical sense." *Ward*, 163 N.H. at 159. Rather, this Court "review[s] the affidavit in a common-sense manner, and determine[s] close cases by the preference to be accorded to warrants." *Id.* (quoting *Dalling*, 159 N.H. at 185).

Under part I, article 19 of the New Hampshire Constitution, search warrants may be issued only upon a finding of probable cause. *State v. Zwicker*, 151 N.H. 179, 185 (2004). Probable cause exists "if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." *Ward*, 163 N.H. at 15 (citing *State v. Orde*, 161 N.H. 260, 269 (2010)); *accord United States v. Ribeiro*, 397 F.3d 43, 49 (1st Cir. 2005) ("[T]he application must give someone of 'reasonable caution'

reason to believe that evidence of a crime will be found at the place to be searched." (*Quoting Texas v. Brown,* 460 U.S. 730, 742 (1983) (plurality opinion).)).

"To establish probable cause, the affiant need only present the magistrate with sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence or contraband sought will be found in the place to be searched." *Ward,* 163 N.H. at 159. The affidavit in support of the warrant need not "establish with certainty, or even beyond a reasonable doubt, that the search will lead to the desired result." *State v. Fish,* 142 N.H. 524, 528 (1997) (quotation omitted).

This Court reviews the trial court's ruling under a totality-of-the-circumstances test to review the sufficiency of an affidavit submitted in an application for a search warrant. *Id.* This Court has posed the question to be answered in the following manner:

> Given all the circumstances set forth in the affidavit before the magistrate, including the veracity and basis of knowledge of persons supplying hearsay information, was there a fair probability that contraband or evidence of a crime would be found in the particular place described in the warrant?

State v. Silvestri, 136 N.H. 522, 525 (1992) (quotations omitted). An affidavit may establish probable cause without the observance of contraband at the location to be searched. *Id.* at 527. However the affidavit "must establish a sufficient nexus

between the illicit objects and the place to be searched." *Ward*, 163 N.H at 160 (citing *Dalling,* 159 N.H. at 186).

The defendant's argument regarding the warrant is three-fold: that the affidavit did not establish the probability that the defendant was sexually attracted to children; that even if the defendant was sexually attracted to children, the affidavit failed to establish that it was probable he possessed CSAI; and finally, that even if the first two parts are true, the affidavit would still fail to make out probable cause. Each of these will be treated in turn below.

A. Sexual Gratification is Not a Requirement of Probable Cause

The defendant argues that the application relied on the inference that the defendant's possession of CSAI was predicated on a probability of sexual attraction to children in order to establish probable cause. DB: 9. There is simply no case law or statute that requires a warrant affidavit to articulate a probability that a person is sexually attracted to children in order to establish probable cause that said person possesses CSAI, nor is it the purpose of a search warrant to establish the mental state for committing a crime. To the contrary, a warrant is a judge's "written order authorizing a law enforcement officer to conduct a search of a specified place and to seize evidence." *In re Medical Records of C.T.,* 160 N.H. 214, 219 (2010) (citing *Black's Law Dictionary* 1470 (9th ed. 2009)).

Furthermore, nowhere in RSA chapter 649-A is there a required element of sexual attraction or sexual gratification.

The defendant argues, "Because that inference was a prerequisite to the chain of reasoning supporting the warrant, the search warrant was not supported by probable cause." DB: 14. This argument is not supported by the affidavit itself. The paragraph in the affidavit that the defendant is referring to does mention sexual gratification, but the passage is brief and uses the qualifier "may." DBA: 45. It can hardly be categorized as a prerequisite for the warrant.

The defendant cites to *United States v. Brunette*, 256 F.3d 14 (1st Cir. 2001), in support of his position that sexual attraction to children must be shown in order to support a warrant. However, the portion that he cites only references the *Brunette* court's holding that any questionable images should be appended to search warrant applications for CSAI for the magistrate to review. DB: 11–12.

Brunette does not require that probable cause be found for a given image (DBA: 64). The facts of *Brunette* do not mirror the facts of the case at hand and are similar only in that they involve charges of possession of child pornography. Here, the State makes no claim that the images on the defendant's laptop at the time of his arrest actually constituted CSAI under RSA 649-A: 2 (2016). Indeed, the nature of those images are not contested as the affidavit itself described them

as "child erotica." DBA: 45. However the distinction between the underlying case and *Brunette* is that in *Brunette*, the only basis for the warrant was images from an Internet account associated with that defendant. There was no additional information—no totality-of-the-circumstances, because the only circumstances were the images. *Id.*

This issue of attaching or describing the suspect images in detail is discussed at length in *State v. Dowman*, 151 N.H. 162 (2004). The defendant cited *Dowman* in his motion to suppress, DBA: 31, as did both the trial court order and the State in response to that motion, DBA: 9, 64. *Dowman* involved a defendant who admitted to owning child pornography, but disputed the search warrant because the affidavit did not detail specific images. However, the *Dowman* court held that a magistrate is not required to view the images and that probable cause for a search warrant involving an investigation into CSAI should be evaluated under the same standard of probable cause used to review warrants generally. *See Dowman*, 151 N.H. at 164.

The court in *United States v. Dennington*, No. 1:07-cr-43-SJM-1, 2009 U.S. Dist. LEXIS 74372, at *1 (W.D. Pa. Aug. 21, 2009), a case which broke with *Brunette,* found that "this Court's job, on review, is not to determine probable

cause anew, but simply to ensure that the magistrate had a 'substantial basis for ... concluding' that probable cause existed." *Id.* at 72.

B. Erotica and Totality-of-the-Circumstances

The defendant cites to a battery of cases that discuss the difference between erotica and child pornography, and how erotica does not constitute CSAI. DB: 13. While there is indeed a distinction between erotica and CSAI, images of child erotica, when taken in a totality-of-the-circumstances context, have been found to weigh in the favor of probable cause for finding CSAI.

In a case cited by the defendant, *Leachman v. State*, No. 01-98-01255-CR, 2006 Tex. App. LEXIS 7345 (Aug. 17, 2006), the court agreed with the affiant, Officer Chapman, who testified that, "child erotica was something that might "seem innocent" or appear "perfectly normal" to some people, but not to others. While taking or possessing the pictures was not criminal, in this case, it was part of the arousal pattern satisfying the defendant's foot fetish. Officer Chapman explained that playing "truth or dare," offering children money to do things, offering to let a child play on your computer, chatting on the Internet with children, and tickling children's feet are not themselves illegal, but combined with the complainant's statement and Officer Chapman's experience with pedophiles,

these things were considered to be "signature" items and actions of a child predator." *Id.* at 17–18.

This totality-of-the-circumstances argument in relation to child erotica is further supported by *United States v. Lancina*, No. 201600242, 2017 CCA LEXIS 436 (NM Ct. Crim. App. June 30, 2017), a case that criticized *United States v. Edwards,* 813 F.3d 953 (10th Cir. 2015), which was heavily relied upon by the defendant. The *Lancina* court held that, "The Eighth Circuit Court of Appeals explained that while the presence of child erotica may not in and of itself provide sufficient probable cause to suspect the presence of child pornography, such facts

> combined with the other facts included in the affidavit," may support a probable cause determination under the totality-of-the-circumstances. *United States v. Hansel*, 524 F.3d 841, 844–46 (8th Cir. 2008) (concluding that photographs of nude girls and other girls in swimsuits described by the investigating officer as "child erotica, not child pornography" could be considered along with allegations of sexual assault and camera and computer equipment in finding probable cause to search for child pornography).

Lancina, 2017 CCA LEXIS at 22–23.

The court concluded that, "the presence of child erotica can be, at minimum, a factor in finding a substantial basis for probable cause to suspect the appellant committed a child pornography offense under the totality-of-the-circumstances. Even wholly innocent behavior frequently will provide the basis for a showing of probable cause." *Id.* at 23.

In addition to *Edwards,* the defendant seems to rest this portion of his argument on the shoulders of *State v. Lantagne*, 165 N.H. 774 (2013). Indeed, the defendant argues that *"Lantagne* alone is sufficient to resolve the issue here ...." DB: 16. However, *Lantagne* reversed a conviction for possession of CSAI because the underlying arrest was for disorderly conduct, which was not ultimately charged at trial, and which was not supported by the officer's observations:

> Photographing properly-attired children in an open and public portion of a park, regardless of whether the photographs were of the children's backsides, were taken surreptitiously, or would be uploaded to a computer, would not have warranted a reasonable belief that the photographer posed a threat of imminent harm to any patrons, including the children. Accordingly, an officer lacked probable cause to arrest defendant for disorderly conduct.

Id. at 775.

The defendant's contention that *Lantagne* supports his argument is misplaced. The conviction for possession of CSAI in *Lantagne* was reversed because the evidence used against the defendant on that charge was obtained as a result of the arrest for disorderly conduct, and therefore was a fruit of the poisonous tree. The defendant assumes that this Court must have considered the crime of possession of CSAI before ruling that it was aware of no other chargeable crime. DB: 16. The defendant then concludes that the decision in *Lantagne* establishes a bright-line rule that possession of "properly-attired children" can

never be considered supportive of probable cause for CSAI charges. *Id. Lantagne* does not support that conclusion.

The defendant also argues a "transposition fallacy" to suggest that the defendant's possession of child erotica created an erroneous conditional probability that the defendant would possess CSAI. DB: 24. This argument would have more merit if the only element in Officer Smith's affidavit was a mention of the images of minor age children viewed on the defendant's laptop at the time of his arrest. However, Officer Smith's affidavit contains many more points, which, when viewed as a whole, created the probable cause for the search warrant:

(1) The circumstances surrounding the defendant's arrest, namely, that he was found with an open laptop containing photos of naked women, and with his pants down around his ankles;

(2) That his previous arrests were for similar behavior in similar situations;

(3) That there were photos on the defendant's laptop that appeared to be of minor age children along with a description of those images;

(4) Statements made by the defendant at the time of his arrest where he admitted to possessing pornography for the purposes of pleasuring himself, that he enjoyed 'cheesecake' photos, and that he used public access WiFi so downloads would not be traced back to him;

(5) A description of Officer Smith's police background and experience and specialized trainings that he has received in connection to CSAI and computers.

DBA: 43–45.

United States v. Syphers, 426 F.3d 461, 465–66 (1st Cir. 2005), speaks to this totality approach:

> Probable cause only requires a probability or substantial chance of criminal activity, not an actual showing of such activity." *United States v. Garcia*, 197 F.3d 1223, 1227 (8th Cir. 1999) (internal quotations and citation omitted). Appellant cites, and the Court finds, no precedent that would require a more substantial showing for a search warrant in a child pornography case post-*Free Speech Coalition*. Thus, an affiant must establish probable cause, based on the totality of the circumstances, that evidence of child pornography depicting minors will be discovered at a particular location to secure a warrant to search at that location.

Id. at 466.

There is a recent case which reconciles *Brunette's* holding that copies of images must be appended to the affidavit with a totality-of-the-circumstances approach. In *United States v. Burdulis*, 753 F.3d 255 (1st Cir. 2014), the court found that "[i]n cases in which the warrant request hinges on a judgment by an officer that particular pictures are pornographic, the officer must convey to the magistrate more than his mere opinion that the images constitute pornography. Here, though, the warrant was not based on any officer's opinion that certain pictures were pornographic." *Id.* at 261. Rather, the officer submitted the defendant's own statements and also noted that the defendant had already sent a pornographic image to a minor. *See id.* Those things "created a reasonable

inference that a search of Burdulis's digital devices would turn up evidence that he possessed pornography." *Id.*

C. The Officer's Training and Experience

The defendant goes on to attack as insufficient the "boiler plate" language of the search warrant affidavit wherein Officer Smith lists his law enforcement background and qualifications. DB: 20. The defendant cites to *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), as support that probable cause must be particularized. However, what *Ybarra* holds is that with respect to the search of an individual person:

> A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person; where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person, and this requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 87. The facts of *Ybarra* are hardly analogous to the facts here and the defendant's application of *Ybarra* to his own case is misplaced.

The salient holding in *Ybarra* is that vague warrants are prohibited. But here, there was no vague warrant. Instead, the affidavit in support of the warrant stated that Officer Smith has been employed with the Amherst Police Department

since August 2002. DBA: 43. He received specialized training in the laws of arrest, search and seizure, and fundamentals of the investigative process. *Id.* Also he had been trained in the digital forensic software tool Lantern, and he was at the time assigned to the New Hampshire Internet Crimes Against Children Task Force. *Id.*

The defendant also cites heavily to *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990). The affidavit at issue in *Weber* gave a broad description of the terms pedophile and molester and collector, and the court needed to know how they applied to the particular defendant. To determine whether the warrant was reasonably obtained, the court considered the time pressure under which the affiant-officer was working when he prepared the warrant. Because of the broadness of the affidavit, and a seeming lack of time pressure, the court determined that there was no need for the "hurried judgment" of the officer. *Id.* at 1345. The affidavit in the underlying case is not overly broad. As has been detailed above, there were plenty of supporting facts and descriptions included by Officer Smith to sufficiently demonstrate probable cause.

Officer Smith's training and experience as a law enforcement officer was sufficient to support the conclusions that the trial court cited in its opinion: "Officers are entitled to draw reasonable inferences from the facts available to

them in light of their knowledge and prior experience." DBA:11 (citing *State v. Davis*, 149 N.H. 698, 701–02 (2003)). Further, "the officer(s) used their common experiences and every day observations" DBA:12.

Officer Smith's assertion that people interested in child pornography would keep the images on their computers did not require any special training. Any officer familiar with the ordinary uses of computers would have the experience to know that documents, photographs, and other information that is of importance to the user is frequently stored on them. This would be particularly true of people interested in child pornography. *See e.g. Smith v. State*, 887 A.2d 470, 472 (Del. 2005).

Officer Smith's reference to the computer being an ideal repository for child pornography is a widely accepted proposition. DBA:48. *See, e.g., United States v. Richardson*, 607 F.3d 357, 369 (4th Cir. 2010) (Acknowledging the affidavit's "boilerplate 'profile' information about the general tendencies of child pornography collectors," particularly that people "involved in the possession and transportation of child pornography rarely, if ever, dispose of their sexually explicit materials and tend to store their collected materials in their 'residence or other secure location to ensure convenient and ready access"); *United States v. Lewis*, 605 F.3d 395, 401 (6th Cir. 2010) (referring to the boilerplate in affidavits

for search warrants for child pornography); *United States v. Prideaux-White,* 543 F.3d 954, 960 (9th Cir. 2008) (noting "child pornography collector characteristics"); *Smith v. State,* 887 A.2d 470, 472 (Del. 2005) (upholding the trial court's finding that the information in the warrant was not stale because "it rises to the level of common knowledge that imagery in computers is still in existence and is persistent" (internal quotation marks omitted)); *State v. Bennett,* 949 N.E.2d 1064, 1069 (Ohio Ct. App. 2011) ("We have recognized in previous cases that images of child pornography are likely to be hoarded by persons interested in those materials, to be viewed in the privacy of their own homes.").

II. THE CHALLENGED IMAGES CONSTITUTED CHILD SEXUAL ABUSE IMAGES.

Next, the defendant contests the sufficiency of the evidence that certain of the images constituted child sexual abuse images. RSA 649-A:3 prohibits the knowing possession or control of "any visual representation of a child engaging in sexually explicit conduct." RSA 649-A:3, I(a) (2016). "Child" means "any person under the age of 18 years," RSA 649-A:2, I (2016), and "sexually explicit conduct" means

> human masturbation, the touching of the actor's or other person's sexual organs in the context of a sexual relationship, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the same or opposite sex or between humans and animals, or any

lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture,

RSA 649-A:2, III.

"When considering a challenge to the sufficiency of the evidence, [this Court' objectively review[s] the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State." *State v. Saunders,* 164 N.H. 342, 351 (2012) (quotation and ellipsis omitted).

A. File names "ca19379", "lsm-05-01-048" and "thCAE6C16J" depict minor children.

Although the State bears the burden of proving beyond a reasonable doubt that the subject depicted is under the age of eighteen years, that element is a question of fact that the fact-finder can resolve by viewing the images. RSA 649-A:6 (2016); *State v. Houghton*, 168 N.H. 269, 272 (2015). "In determining child pornography, based upon its everyday experiences, a trier of fact can determine from a photograph whether a child is under the age of eighteen." *State v. Cobb,* 143 N.H. 638, 646 (1999) (quotations omitted). "To require identification of the child and conventional proof of age would render statutes designed to protect children inoperable." *Id.*(quotation and ellipsis omitted).

The defendant argues that the three images, "ca19379," "lsm-05-01-048," and "thCAE6C16J" do not portray an individual less than 18 years old.

The file named "ca19379" depicts what appears to be a very young girl sitting with her legs bent at the knees, feet flat on the floor. She is feeding grapes to what appears to be a toy rabbit while sitting on a shag rug. Her hair is in pig tails and her genitalia and nipples are exposed. The viewer can clearly see her genitalia and there is no pubic hair apparent. The girl's chest is flat. While the girl's face is looking down, her entire countenance is viewable. The image is very clear.

The file named "lsm-05-01-048" depicts two females stretched out on a bed and table. The female on the bottom is resting on her stomach, looking at the camera. She appears to be older than the second female who is lying on top of her. The second female is a young girl with braids. She is lying face-up straddling the back of the first female. This girl's face is fully in view, with her breasts exposed. Her hair is in braids. It should be noted that the pose this girl is in is extremely awkward and unnatural. This image is clear.

The file named "thCAE6C16J" depicts a young girl lying on her stomach with her feet (which appear dirty) tucked into her buttocks. Her back is arched and her face is propped in her hands, looking away from the camera, but still visible

enough to the viewer to determine that she appears very young. This image is clear.

The defendant cites *Houghton* to support his contention that when the face is obscured in CSAI, it is insufficient because one cannot determine age. That is not the case here. Regarding the image at issue in *Houghton*, the court noted that the individual appeared to have undergone puberty and the image was too heavily pixilated to determine age. *Houghton*, 168 N.H. at 272. In this case, however, the young girls depicted in these three images have all clearly not undergone puberty, particularly in file "ca19379," where the girl has no pubic hair and no breasts. None of the faces in these images are obscured, nor are the images themselves difficult to view.

The defendant also makes an argument that the State should have called an expert witness to aid in "aging" the girls, or should have attempted to discover the identity of these girls or submitted birth certificates. This argument is unavailing and unsupported. The defendant's footnoted citation here of *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 443 (1st Cir. 2007), does not serve the defendant's cause. What *Rodriguez-Pacheco* in fact held was that there was no requirement for the government to produce expert testimony in addition to the

images themselves. *Id.* at 439. The defendant is unable to cite to any authority that requires the State to introduce any evidence other than the images themselves.

B. The files named "lsm-05-01-048" and "thCA517BFO" do show the buttocks and or genitalia of the young girls depicted in the images.

The file named "lsm-05-01-048" was described above and does indeed depict a young girl's genitalia. As the girl on top of the other female is stretched out on her back with her legs splayed, completely nude, the girl's *mons pubis* is clearly in view. The spirit of RSA 649-A:3 is to protect young children from exploitation and to quibble over whether the top portion of the vagina constitutes "genitalia" is unseemly and unproductive.

The file named "thCA517BFO" depicts a young girl with flowers in her hair, facing the camera while lying on her left side with one leg extended in the air and the other leg tucked into her thigh as in a bicycle kick. She is wearing high heels and has vines wrapped around one leg. Her full chest and the right side of her buttock are exposed. The defendant is unable to cite to any authority that requires the full buttocks to be viewable and therefore his argument that her buttocks are not exhibited is in error.

C. The file images named "ca19379", "CA7DDVC2", "thCA9TPYU5", "thCA517BFO", "thCAE6C16J" and "thCAQJFBIZ" involve the lewd exhibition of the genitals or buttocks.

The State bears the burden of proving that the images depict "sexually explicit conduct." With respect to a claim that the images contain "lewd exhibitions of the ... genitals," this Court has found instructive the six-factor test adopted in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). *State v. Lopez*, 162 N.H. 153, 156 (2011). The six factors are:

(1) Whether the focal point of the visual depiction is on the child's genitals or pubic area;

(2) Whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity;

(3) Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

(4) Whether the child is fully or partially clothed, or nude;

(5) Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

(6) Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. (quotation omitted).

The Massachusetts Appeals Court has recently considered whether a photograph of a naked girl was "lewd" for the purposes of a criminal charge. *See*

Commonwealth v. Sullivan, 972 N.E.2d 476 (Mass. App. Ct. 2012). Applying the *Dost* factors, the court concluded that the image placed the girl's developing breast "in the front and center of the photograph" and that her hands pointed to her exposed pubic area. *Id.* at 485. It concluded that based on this, it was not simply an image of the girl posing nude, *compare Commonwealth v. Rex*, 11 N.E.3d 1060, 1071 (Mass. 2014) ("Based on our *de novo* review of the photocopies, it is plainly apparent that their only notable feature is the nudity of the children."), but was designed to draw the viewer's attention to her breasts and pubic area. *Sullivan,* 972 N.E.2d at 485. The court further concluded that she was "of an age when girls normally are clothed even when in nature or in a stream" and "well past the age of the 'Coppertone girl.'" *Id.* at 486 (quotation omitted). Although the court concluded that setting of the image was not sexually suggestive and the image did not suggest a sexual coyness or willingness to engage in sexual activity, it ultimately concluded that the image was "designed to elicit a sexual response" and held that the image was a lewd exhibition of the girl's genitals and breasts. *Id.* at 486–87.

Turning to the six images challenged by the defendant for a lack of "lewdness," these arguments are unavailing. The images contain much to support the trial court's conclusions.

The defendant argues that all the images depict the girls' full bodies and the camera does not focus specifically on their genitalia, nor do they involve a sexually suggestive setting because three were taken outdoors and three were taken in a photography studio. DB: 28–33. Additionally, the defendant argues that none of the photographs involve an unnatural pose or inappropriate attire or suggest a sexual coyness or willingness to engage in sexual activity. DB:33–34.

In image "ca19379," described above, one can clearly see the girl's genitalia. Because she is sitting facing the camera with her legs bent and knock-kneed, the eye is drawn to the girl's pubic area. Her *labia majora* are clearly visible and more or less at the center of the photo. As for the setting of the photo, it does appear to be taken in a studio. That in and of itself does not negate a "sexually suggestive setting," although the setting is certainly bizarre: there is a spinning wheel in the background and the girl is staged next to a stuffed rabbit on a shag rug, feeding the rabbit grapes.

"thCA9TPYU5" and "thCA517BFO" were also taken in what appear to be studios, and both depict the genitalia of very young girls. "thCA9TPYU5" shows a young girl with flowers in her hair and elbow-length gloves, lying on her side with her left hand on her hip, smiling directly into the camera. The nipples on her flat chest are exposed, as is her hairless *mons pubis*. Her legs are separated as if one is

lifted, and she is lying on a blanket next to a stuffed animal. There is also a robe or cloth draped near the girl's hips, calling attention to her pubic area.

"thCA517BFO" shows a young girl completely nude, except for a pair of high heels, lying on the ground with flowers in her hair. There appears to be a jungle theme as the girl has vines suggestively wrapped around one of her legs. The side of her right buttock is exposed as is her chest.

"CA7DDVC2," "thCAE6C16J," and "thCAQJFBIZ" as the defendant suggests, appear to have been taken outdoors—or in a studio staged as the outdoors. "CA7DDVC2" shows a girl in the water with her buttocks facing up and the viewer can see a nipple on a flat chest. The underside of the girl's vagina is also evident between the girl's legs. She is in a very awkward, contorted pose, smiling.

"thCAE6C16J" has been described above, but again, the side of her buttocks are apparent and her back is arched in a sexually suggestive way. The soles of her feet also appear to be dirty and her feet are tucked close to her buttocks.

"thCAQJFBIZ" shows a very young girl lying on her side in a wooded area with flowers in her hair. There is a blanket or cloth draped over her waist but both buttocks are exposed and the heel of her left foot is propped awkwardly near her

vagina. Her nipples are exposed and her chest is flat. She is smiling into the camera and, similar to the images mentioned above, the pose looks uncomfortable and unnatural—she is propping herself up with her left hand.

The defendant has argued that these images have not satisfied factor two in the *Dost* test: "whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity." *See Dost,* 636 F. Supp. at 828. It must be pointed out that not all factors must be present to reach a determination that a visual depiction is a lewd exhibition of the genitals. *Id.* (quotations omitted).

Certainly the girls' poses are associated with sexual activity—completely nude with their legs either awkwardly bent showing their pubic areas or buttocks or both, or lying on their sides with full-frontal nudity. The settings themselves were clearly staged to appeal to someone's idea of a sexual setting. The defendant cited *State v. Bergeron*, No. 2016-0088, order at 5 (N.H. June 30, 2017), to support his contention that the photographs at issue were not lewd. However, in an earlier cite of the same case, this Court reiterated that all evidence must be considered in a sufficiency challenge. See *State v. Bergeron*, 2016 LEXIS 213 (N.H.Sept. 16, 2016). The defendant in *Bergeron* had an avowed interest in images of young boys, and this Court thus held that "a fact-finder could

reasonably consider this evidence to support the conclusion that the images on the defendant's computer depict boys under the age of eighteen." *Id.* Applying this to the case at hand, given the self-proclaimed predilection of the defendant for "cheesecake" photos, or photos of girls in tights or pantyhose, a factfinder could conclude that the defendant possessed these images because he associated the depicted poses with sexual activity.

The defendant's last points, that none of the six images depict an unnatural pose or inappropriate attire or suggest sexual coyness, are unavailing. The young girls in these photos are not in natural poses. They are staged with their legs lifted or bent or their torso or arms twisted. They are not sitting in chairs or even standing. They are propped up like so many dolls. They are all completely nude with the exception in some cases of gloves or high heels or heavy, mature jewelry, which is hardly appropriate attire for girls this young.

As to sexual coyness or a willingness to engage in sexual activity, the First Circuit has addressed precisely this element as it applies (or doesn't apply) to children: "Children do not characteristically have countenances inviting sexual activity, and the statute does not presume that they do. By suggesting that the child subject must exhibit sexual coyness in order for an image to be lascivious, the

district court in *Dost* ran the risk of limiting the statute." *United States v. Fabrizio*, 459 F.3d 80, 89 (1st Cir. 2006).

For all of the foregoing reasons, and when viewed in the light most favorable to the State, the images that were the bases for the defendant's convictions are CSAI.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a five-minute argument before a 3JX panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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Attorney General

March 12, 2018

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CERTIFICATE OF SERVICE

I, Katherine Triffon, hereby certify that two copies of the foregoing were mailed this day, postage prepaid to Thomas Barnard, Senior Assistant Appellate Defender, counsel of record, at the following address:

Thomas Barnard
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Appellate Defender Program
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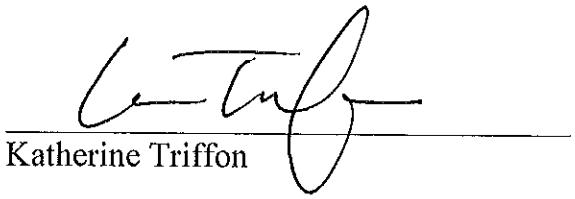
March 12, 2018



Katherine Triffon

THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-northern judicial district
No. 2017-0280

THE STATE OF NEW HAMPSHIRE

v.

ROBERT NORMAN

Argued: May 15, 2018
Opinion Issued: July 6, 2018

Gordon J. MacDonald, attorney general (Katherine A. Triffon, attorney, on the brief and orally), for the State.

Thomas Barnard, senior assistant appellate defender, of Concord, on the brief and orally, for the defendant.

HANTZ MARCONI, J. The defendant, Robert Norman, appeals his convictions on seven counts of possession of child sexual abuse images following a bench trial on stipulated facts in Superior Court (Brown, J.). See RSA 649-A:3, I(a) (2016). On appeal, he argues that the superior court erred by denying his motion to suppress in which he argued that the affidavit submitted in support of the search warrant application failed to establish probable cause that his electronic devices would contain child sexual abuse images. He also argues that the evidence was insufficient to prove, beyond a reasonable doubt, that the images associated with the seven indictments depict

sexually explicit conduct. See RSA 649-A:2, III (2016), :3, I(a). He further challenges three of the indictments on the ground that the images associated with them do not depict a child. See RSA 649-A:2, I (2016), :3, I(a). We reverse and remand.

I. Motion to Suppress

A. Affidavit

The following facts are drawn from the affidavit submitted in support of the search warrant application. In February 2016, members of the Hillsborough County Street Crimes Task Force were conducting surveillance in the Wal-Mart parking lot in Amherst. The officers observed a man, later identified as the defendant, who appeared to be passed out in the driver's seat of his pick-up truck. Concerned that he might have overdosed, they approached the vehicle.

Upon reaching the vehicle, the officers knocked on the window, and the defendant sat up. They noticed that his pants were pulled down to his ankles and that his genitals were exposed. They further observed a cell phone, and a laptop computer displaying a partially nude adult female in a provocative position.

After some discussion with the defendant, he consented to a search of his laptop, cell phone, and vehicle. On the laptop, the police found "numerous folders . . . which contained images of women in various stages of undress and positions." Interspersed among those images were images of children whom the officers estimated were "between the ages of 6 and 15." "The younger of the children were in sundresses," and "[t]he teenage females were in cheerleader outfits." When questioned about the images, the defendant stated that he did not have any nieces or nephews and that there were no photographs of family members on his computer. The defendant also "admitted that he was inclined to have images of younger females if they were wearing pantyhose or tights."

The defendant was subsequently arrested for indecent exposure and lewdness. See RSA 645:1 (2016). The police seized his cell phone, his laptop, and an external hard drive that they found in the vehicle. At the police station, the defendant was questioned further about the images observed on his computer. He told the police that "there were some folders on his laptop which contained pornography" and "estimated that there were approximately 500 images." He denied that his cell phone contained pornography. The defendant also stated that he used the external hard drive found in his vehicle "to back up his computer," and that he "used the public access wifi service at the Nashua Library to access the Torrent website to download movies and television shows . . . so that the downloads would not be traced back to him."

The defendant told the police that he does not use "the Torrent network for pornography"; instead, he "uses Google and Yahoo!" to search for pornography.

"When asked specifically about the images of the children, [the defendant] stated that the images sometimes appear when he searches for his fetishes[:] pantyhose, legs, and/or feet." The defendant told the police that, to his knowledge, none of the images were "of someone who is pre-teen." He "added that he likes 'cheesecake pictures,'" which are "images that are meant to be a tease, not nude, but suggestive." The officer-affiant who later applied for the search warrant averred that "[t]his description matches that of what officers observed mixed within the adult pornography observed," and that "[t]hese types of images are referred to as child erotica, which is typically a prelude to sexually explicit images of children."

The defendant was also questioned about his conduct in the pick-up truck. He initially told the police that "his pants were down as a result of preparing to change his underwear when his girlfriend called," but later "admitted that his laptop was open with one of his images to 'stimulate' himself."

During the interview, the police questioned the defendant about "a similar situation" that had occurred in Salem. The defendant claimed that he was arrested by the Salem police for disorderly conduct after giving someone the middle finger. The interviewing detectives contacted the Salem police who reported that the defendant had actually been arrested for indecent exposure and lewdness as well as disorderly conduct in August 2014, after he was found in a parked vehicle in a similar state of undress, viewing adult pornography on his laptop. Although this information established that the defendant had not been fully forthcoming in his description of his Salem arrest, it provided no evidence that he had been found in possession of child pornography.

Near the end of the February 2016 interview, the defendant refused a request by the police to provide the password to his laptop, stating that "there were banking records on his computer." The police thereafter applied for a warrant to search the defendant's laptop, external hard drive, and cell phone for evidence of the crime of possession of child sexual abuse images.

In addition to the information recounted above, the affidavit supporting the search warrant application contained information based on the training and experience of the officer-affiant. He averred that, "[b]ased on [his] previous investigative experience related to child pornography investigations, [his] training, and the experience of other law enforcement officers with whom [he has] had discussions, [he] know[s] there are certain characteristics common to individuals who . . . possess . . . child pornography." He averred that such individuals: (1) "may receive sexual gratification, stimulation, and satisfaction from . . . fantasies they may have [when] viewing children engaged in sexual

activity or in sexually suggestive poses, . . . in person, in photographs, or other visual media, or from literature describing such activity"; (2) "may collect sexually explicit or suggestive materials" and "often use these materials for their own sexual arousal and gratification"; (3) "almost always possess and maintain their 'hard copies' of child pornographic material . . . in the privacy and security of their home" and "typically retain pictures, films, photographs, . . . child erotica, and videotapes for many years"; (4) "often maintain their child pornography images in a digital or electronic format in a safe, secure and private environment, such as a computer"; (5) "may correspond with and/or meet others to share information and materials" related to child pornography; (6) "generally have knowledge about how to access hidden and secretive cloud based locations involved with child pornography"; and (7) "typically prefer not to be without their child pornography for a prolonged time period."

The Circuit Court (Ryan, J.) granted the search warrant application based upon the submitted affidavit. A forensic examination of the defendant's laptop and external hard drive revealed the images that later served as the basis for the charges of possession of child sexual abuse images. Each charge was based upon a separate digital image found on the defendant's electronic devices. Before trial, the defendant moved to suppress the images, arguing that the affidavit supporting the search warrant application failed to establish probable cause. The superior court denied the motion, after determining that the affidavit established "a fair probability that evidence of child pornography would be found on [the] defendant's computer and hard drive."

B. Analysis

The defendant argues that the search warrant was not supported by probable cause, in violation of the State and Federal Constitutions. See N.H. CONST. pt. I, art. 19; U.S. CONST. amends. IV, XIV. We first address the defendant's claim under the State Constitution and rely upon federal law only to aid our analysis. State v. Ball, 124 N.H. 226, 231-33 (1983).

Part I, Article 19 of the State Constitution requires that search warrants be issued only upon a finding of probable cause. State v. Ball, 164 N.H. 204, 207 (2012). Probable cause to search exists "if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." Id.

The task of the issuing magistrate "is to make a practical, common-sense decision whether[,] given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. (quotation omitted); see Illinois v. Gates, 462 U.S. 213, 238 (1983). Although an affidavit may establish probable cause to search without the observance of contraband at the place to be searched, to meet

constitutional muster, it must evince a sufficient nexus between the illicit objects and the place to be searched. Ball, 164 N.H. at 207.

We afford much deference to the magistrate's probable cause determination. Id. at 208. Our task on appeal is "to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Gates, 462 U.S. at 238-39 (quotation, ellipsis, and brackets omitted); see Ball, 164 N.H. at 207. In so doing, we may consider only the information that was brought to the magistrate's attention, which in this case is restricted to the information set forth in the affidavit supporting the warrant application. See Ball, 164 N.H. at 207.

Like the magistrate, we review the affidavit in a common-sense manner. Id. We "will not invalidate warrants by reading the supporting affidavit in a hypertechnical sense," and we resolve "close cases by the preference to be accorded to warrants." Id. at 208 (quotation omitted); see Gates, 462 U.S. at 236. Nevertheless, under this standard, we may properly conclude that a warrant is invalid because the magistrate's probable cause determination "reflected an improper analysis of the totality of the circumstances." Ball, 164 N.H. at 207 (quotation omitted). We review the superior court's decision regarding the sufficiency of the affidavit de novo. See id.

The issue in this case is whether the affidavit provided the magistrate with a substantial basis for finding that there was a fair probability that the defendant's laptop, cell phone, or external hard drive contained child sexual abuse images. A child sexual abuse image is an image that depicts a child engaged in "sexually explicit conduct." RSA 649-A:3, I(a). A "child" is a person younger than 18 years of age. RSA 649-A:2, I. "Sexually explicit conduct" includes: masturbation; touching one's own "sexual organs" or those of another "in the context of a sexual relationship"; actual or simulated "normal or perverted" sexual intercourse, "whether alone or between members of the same or opposite sex"; and "any lewd exhibitions" of the buttocks or genitals. RSA 649-A:2, III.

Viewing the affidavit in a common-sense manner and considering the totality of the circumstances set forth therein, we conclude that the magistrate did not have a substantial basis for finding that there was a fair probability that child sexual abuse images would be found on the defendant's electronic devices. In this case, the images that the officers viewed on the defendant's laptop were of adult women "in various stages of undress and positions," girls in sundresses, and female teenagers in cheerleader outfits. The affidavit did not allege that any of the images the police viewed constituted child sexual abuse images. See United States v. Edwards, 813 F.3d 953, 963, 965 (10th Cir. 2015). On appeal, the State does not contend otherwise. The defendant's inclination to view pornographic images of adult women, images of girls in sundresses and teenagers in cheerleader outfits, or images of "younger

females" in pantyhose or tights is insufficient to support the inference that he would commit the crime of possessing child sexual abuse images and that his electronic devices would contain such images. See Jacobson v. United States, 503 U.S. 540, 551 (1992).

"In other contexts, courts are reluctant to presume that persons are inclined to engage in certain illegal activity based on having engaged in a particular legal activity." Edwards, 813 F.3d at 964. In Jacobson, for example, an entrapment defense case, the United States Supreme Court found that the petitioner was "acting within the law" when he received magazines containing "sexually explicit depictions of children" because, at the time, that conduct was lawful. Jacobson, 503 U.S. at 551. The Court ruled that his receipt of the magazines could not establish his predisposition to receive or possess child pornography "independent of the Government's acts," as required to defeat his entrapment defense. Id. at 554. As the Court explained, "proof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit the crime charged independent of the Government's coaxing." Id. at 551 n.3. "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it." Id. at 551.

"Admittedly, Jacobson is distinguishable not only because of its focus on entrapment but also because . . . [it] concerns the quantum of evidence required for proof beyond a reasonable doubt at trial." Edwards, 813 F.3d at 964 (citations omitted). "Nevertheless, we find its reasoning instructive on the danger of assuming that legal conduct standing alone suggests the actor is also inclined to engage in criminal conduct." Id.

We acknowledge that "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts," Gates, 462 U.S. at 243 n.13, and that "innocent or legal conduct may be infused with the degree of suspicion necessary to support a finding of probable cause when examined through the lens of those versed in the field of law enforcement," Edwards, 813 F.3d at 965 (quotations omitted). However, even when we view the affidavit through the insight provided by the officer-affiant's law enforcement experience, we conclude that it failed to provide a link between the viewing of legal adult pornography and so-called "child erotica" and the possession of child sexual abuse images sufficient to establish a fair probability that such illegal images would be found on the defendant's laptop, external hard drive, and/or cell phone. See id. at 964-69.

The affidavit contained only one allegation purporting to link the possession of "child erotica" with the possession of child sexual abuse images: the affiant's averment that "child erotica . . . is typically a prelude to sexually explicit images of children." However, the affiant did not provide any foundation for this statement. Rather the affidavit posited that individuals who have sexual images of children typically retain those images, including child erotica, for many years. If the officer-affiant meant that people who possess child pornography have been shown to have possessed "child erotica" before possessing the child pornography, we have no reason to question that this may "typically" be true. However, the problem here is that there was no evidence that the defendant possessed child pornography — instead, that was what the police were hoping to learn by obtaining the warrant. If what the officer-affiant meant, however, was that people who possess only non-pornographic images of children "typically" also possess child pornography, the affidavit provided no basis on which to assess the accuracy of that assertion.

In addition, the affidavit included allegations about the common characteristics of individuals who possess child pornography. However, those allegations were "not drafted with the facts of this case or this particular defendant in mind." United States v. Weber, 923 F.2d 1338, 1345 (9th Cir. 1990). The officer-affiant averred that he knew that "there are certain characteristics common to individuals who . . . possess . . . images of child pornography" and that the defendant "likely displays" those characteristics. However, the affidavit failed to allege any facts that would provide a substantial basis for believing that the defendant actually exhibited those characteristics.

For example, the officer-affiant averred that one common characteristic of individuals who possess child pornography is that they receive sexual gratification "from contact with children" or "from fantasies they may have [when] viewing children engaged in sexual activity or in sexually suggestive poses." Yet, there were no allegations that the defendant had any contact with children or that he fantasized about children. Similarly, the officer-affiant averred that individuals who possess child pornography may collect "sexually explicit or suggestive materials" featuring children for "their own sexual arousal and gratification" or use such "materials to lower the inhibitions of children they are attempting to seduce," yet there were no allegations that the defendant collected such materials or that he used them to seduce children. Nor does the affidavit's general statement that individuals who possess child pornography "often maintain their child pornography images" in a computer suffice. "There simply is nothing in this statement indicating that it is more (or less) likely that [the defendant's] computer might contain images of child pornography." United States v. Falso, 544 F.3d 110, 122 (2d Cir. 2008). In short, the officer-affiant's assertions about the common characteristics of those who possess child sexual abuse images do not establish a fair probability that the defendant shared those characteristics. See Edwards, 813 F.3d at 969.

In this case, the defendant was viewing pornographic images of adult women, not of children. The other images the officers viewed on his laptop were of girls in sundresses and female teenagers in cheerleader outfits, and, although the officer-affiant describes those images as "child erotica,"[1] he does not aver that they constitute child sexual abuse images. The fact that the defendant's laptop contained pornographic images of adult women and non-pornographic images of "younger females" did not provide a substantial basis for the magistrate to find probable cause that it also contained child sexual abuse images. See United States v. Perkins, 850 F.3d 1109, 1120, 1122 (9th Cir. 2017) (holding that the defendant's "legal possession of two non-pornographic images" and two 20-year-old convictions for incest and child molestation were insufficient to support probable cause to search for child pornography). Accordingly, we reverse the superior court's conclusion to the contrary. Because the defendant has prevailed under the State Constitution, we need not reach his argument under the Federal Constitution. See Ball, 124 N.H. at 237.

II. Sufficiency of the Evidence

Although we conclude that the evidence obtained from the search warrant should have been suppressed at trial, we address the defendant's argument that the evidence was insufficient to convict him because the State has not indicated whether it intends to retry him, and because, if the evidence was insufficient, "the Double Jeopardy Clauses of both the New Hampshire and United States Constitutions would preclude a new trial." State v. Gordon, 161 N.H. 410, 418 (2011) (quotation omitted). When analyzing the sufficiency of the evidence, we consider all of the evidence, including that which was erroneously admitted. Id.; see State v. Morrill, 169 N.H. 709, 718 (2017) (explaining that "although the evidence seized during the search . . . should not have been admitted at trial, we consider this evidence in assessing the defendant's challenge to the sufficiency of the evidence").

RSA 649-A:3 states, in relevant part, that "[n]o person shall knowingly . . . possess . . . any visual representation of a child engaging in sexually explicit conduct." RSA 649-A:3, I(a). The defendant argues that the evidence was insufficient to prove, beyond a reasonable doubt, that the images associated with the seven indictments depict "sexually explicit conduct." See RSA 649-A:2, III, :3, I(a). He further challenges three of the indictments on the ground that the images associated with them do not depict an individual younger than 18 years of age. See RSA 649-A:2, I (defining "[c]hild" as "any person under the age of 18 years").

When considering a challenge to the sufficiency of the evidence, we objectively review the record to determine whether a rational trier of fact could

[1] We note that "child erotica" is a legally inexact term.

have found the essential elements of the crime beyond a reasonable doubt, considering all of the evidence and all reasonable inferences therefrom in the light most favorable to the State. State v. Houghton, 168 N.H. 269, 271 (2015). We will assume, without deciding, that the images are circumstantial evidence of the age of the individuals depicted. See id. "When the evidence is solely circumstantial, it must exclude all rational conclusions except guilt." State v. Lopez, 162 N.H. 153, 155 (2011) (quotation omitted). "Under this standard, however, we still consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation." Id. (quotation omitted).

A. Age

The defendant contends that the evidence was insufficient to prove, beyond a reasonable doubt, that the images associated with indictments 1240145C, 1240148C, and 1240149C depict an individual younger than 18 years of age. "We have previously observed that the determination of the age of the subjects in a photograph is for the trier of fact, relying on everyday observations and common experiences." Houghton, 168 N.H. at 272 (quotation and brackets omitted). "In determining child pornography, based upon its everyday experiences, a trier of fact can determine from a photograph whether the subject is under the age of 18." Id. (quotation omitted).

Indictment 1240145C: The girl in the image associated with this indictment is very small in stature and appears to have no indicators of puberty. Her face is that of a young child.

Indictment 1240148C: The face of the girl in the image associated with this indictment appears to be that of a younger teenager. Her lack of body development suggests that she has not completed puberty.

Indictment 1240149C: The girl in the image associated with this indictment appears to be a young child. She is small in stature. There are no indicators that she has started puberty.

Viewing these images in the light most favorable to the State, we conclude that the evidence was sufficient for a rational trier of fact to have found, beyond a reasonable doubt, that these images depict girls younger than 18 years of age.

B. Sexually Explicit Conduct

The defendant also contends that the evidence was insufficient for a rational trier of fact to have found, beyond a reasonable doubt, that the images associated with the seven indictments depict "sexually explicit conduct." See RSA 649-A:3, I(a). "Sexually explicit conduct" is statutorily defined as:

> human masturbation, the touching of the actor's or other person's sexual organs in the context of a sexual relationship, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the same or opposite sex or between humans and animals, or any lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture. Sexual intercourse is simulated when it depicts explicit sexual intercourse that gives the appearance of the consummation of sexual intercourse, normal or perverted.

RSA 649-A:2, III. The specific sexually explicit conduct at issue with these seven images is an alleged lewd exhibition of the buttocks or genitals.

The legislature has not defined what constitutes a lewd exhibition of the buttocks or genitals. See Lopez, 162 N.H. at 156. In Lopez, we identified the following factors as "instructive" in determining whether a visual depiction constitutes "a lewd exhibition of the genitals":

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. (quotation omitted). Not all of these factors must be present to conclude that a visual depiction is a lewd exhibition. Id.

Indictment 1240142C: The image associated with this indictment depicts a naked, prepubescent girl with strappy high heels and flowers in her hair. Her pose is unnatural; one of the cheeks of her buttocks is exposed.

Indictment 1240143C: The image associated with this indictment depicts a naked, prepubescent girl lying on her side displaying her buttocks as well as her genitals.

Indictment 1240145C: The image associated with this indictment depicts a naked, prepubescent girl lying on her stomach with her head resting on her hands, the position of her legs drawing attention to her naked buttocks.

Indictment 1240146C: The image associated with this indictment depicts a naked, prepubescent girl lying on her side, displaying her genitals.

Indictment 1240147C: The image associated with this indictment depicts a naked, prepubescent girl lying on her side in the water, with her legs spread apart, displaying her buttocks as well as her genitals.

Indictment 1240148C: The image associated with this indictment depicts a naked pubescent girl, buttock exposed, lying unnaturally, bent back on top of another naked female.

Indictment 1240149C: The image associated with this indictment depicts a prepubescent girl posing naked on a carpet, with her feet spread apart, displaying her genitals.

Based upon our review of the images in the light most favorable to the State, and after considering the above-enumerated factors, we conclude that the evidence was sufficient for a rational trier of fact to have found, beyond a reasonable doubt, that each image depicts "sexually explicit conduct."

Reversed and remanded.

LYNN, C.J., and HICKS, BASSETT, and DONOVAN, JJ., concurred.